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Supreme Court, U.S.
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No. 09

IN THE

Supreme Court of the United States

EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC CO.,

Petitioner,

v.

MT. OLIVET TABERNACLE CHURCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the plaintiff preserved a fire scene for 19 months after it had established a theory of cause and origin and identified a target defendant. But then, nearly two years after the fire, the plaintiff destroyed the scene, only thereafter notifying and bringing suit against the manufacturer of a heater alleged to have caused the fire. The manufacturer had no notice of the claim and no access to the fire scene before the scene was destroyed. Affirming a judgment for the plaintiff, the Pennsylvania state courts provided no sanction against the plaintiff-spoliator nor any remedy for the defendant manufacturer.

The question presented is: Whether the state courts' failure to sanction a party for its intentional spoliation of critical evidence in a civil case made a meaningful hearing impossible, deprived the defendant of a full and fair opportunity to defend itself, and hence denied the defendant due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner in this case is Emerson Electric Co. (hereinafter, "Emerson"). Respondent is Mt. Olivet Tabernacle Church; however, the real party in interest in this subrogation case is the Church's insurer, Church Mutual Insurance Co. (Hereinafter, Mt. Olivet Tabernacle Church and Church Mutual Insurance Co are referred to simply as "plaintiff").

CORPORATE DISCLOSURE STATEMENT

Emerson Electric Co. is a publicly held corporation which has no parent company, and no publicly held company owns ten percent or more of its stock. At the relevant time, Edwin L. Wiegand was a Division of Emerson Electric Co.

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 03-

EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC CO.,

Petitioner

v.

MT. OLIVET TABERNACLE CHURCH,

Respondent

Emerson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania denying reargument in this case is not reported but may be found at 2002 Pa. LEXIS 3005 (December 27, 2002) (Petitioner's Appendix ("App.") at 12a). The Pennsylvania Supreme Court's *per curiam* decision is reported at 811 A.2d 565 (Pa. 2002) (App. at 12a). The Pennsylvania Superior Court's opinion is reported at 2001 Pa. Super 232, 781 A.2d 1263 (2001) (App. at 13a). The opinion of the Court of Common Pleas, First Judicial District, is not reported but is included in the Appendix. (App. at 39a)

STATEMENT OF JURISDICTION

The *per curiam* order of the Supreme Court of Pennsylvania was entered on November 13, 2002. The Supreme Court of Pennsylvania denied a petition for rehearing on December 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case arises out of a fire which occurred in 1994, at the Mt. Olivet Tabernacle Church, a Baptist Church located in West Philadelphia, Pennsylvania. Post-fire investigation by adjusters for the Church and Church Mutual, the Church's insurer, focused on an immersion heater which had been manufactured by Emerson Electric for industrial applications and had been wired and used by the Church to heat water in the Church's large baptismal font. During the course of the fire investigation – indeed, as early as the day of the fire – agents for the Church identified Emerson as the manufacturer of the immersion heater. The fire scene was preserved for nineteen (19) months after the fire, during which time the Church culled the scene in search of evidence to support its theory against Emerson. The Church then demolished the fire scene - and all other evidence of cause and origin - before it notified Emerson. Notwithstanding that the Church knew Emerson had manufactured the primary component of

the immersion heater (the heating element sold by Emerson was used for a variety of purposes and sold without 200 volt wiring, plugs, or other attachments), the Church did not notify Emerson until September 30, 1996 -- almost two years after the fire and three months after the entire fire scene was destroyed -- of the fire or of any potential claim against it.

Four days before the statute of limitations was to expire in November 1996, the Church commenced an action against Emerson seeking recovery for property damage under negligence and product liability (failure to warn and design defect) theories. In its answer to the Complaint and at every stage thereafter, Emerson interposed as a defense the fact that plaintiff's destruction of the scene – including all evidence supporting alternative theories of causation -- had unfairly prevented Emerson from investigating the scene and discovering alternative causes of the fire. Emerson repeatedly argued that plaintiff's conduct precluded Emerson from presenting an adequate defense to plaintiff's claims.

Despite Emerson's tenacity in bringing this issue before the court in the form of discovery, summary judgment, and *in limine* motions, Emerson's pre-trial attempts at leveling the playing field were repeatedly rejected by the trial court. Emerson reiterated its position at trial by asking the court to issue an "adverse inference" jury instruction, which would have allowed the jury to assume that the missing evidence would have been harmful to plaintiff, but that request, too, was denied.

The jury returned a verdict in favor of plaintiff and against Emerson in the amount of $981,000.00. Thereafter, Emerson filed post-trial motions on a number of grounds, includ-

ing the assertion that the trial court's failure to issue any sanction in response to plaintiff's spoliation violated its due process rights under the U.S. Constitution, see Post-trial Memorandum of Law at 27, but the trial court denied all of Emerson's requests for post-trial relief. On appeal, a three-judge panel of the Pennsylvania Superior Court, by opinion dated August 13, 2001, affirmed the trial court's decision. Thereafter, Emerson filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking discretionary review of the issue.

Emerson's Petition was granted in May 2002 -- an indication that the Pennsylvania Supreme Court believed that the spoliation here at issue warranted further review -- and the case was briefed and argued. On November 13, 2002, the Pennsylvania Supreme Court affirmed the decision of the Pennsylvania Superior Court in its entirety, without explanation, in a *per curiam* decision. The Supreme Court of Pennsylvania, of course, did not address the due process issue, as it wrote no opinion at all. Emerson's Petition for Reargument, filed on November 27, 2002, was denied by the Pennsylvania Supreme Court on December 27, 2002.

At every stage of the Pennsylvania proceedings -- in the trial, appellate, and supreme courts -- Emerson's fundamental fairness/due process rationale was a leitmotif of Emerson's briefs and arguments. Throughout the trial court proceedings, Emerson repeatedly asserted its objection to the plaintiff's intentional spoliation of evidence and continued to insist on appropriate sanctions.[1] For example, in the Memorandum of

[1] See Motion for Summary Judgment at ¶ 40, 41.

Law in Support of its Motion for Summary Judgment, Emerson contended that plaintiff's intentional spoliation had "effectively eliminated Defendant's ability to present evidence to the jury as to the actual cause of the fire," *id.* at 5, and cited to the District of Maine's decision in *Northern Assurance Co. v. Ware*, 145 F.R.D. 281 (D. Maine 1993), and its holding that if spoliation goes unchecked "the truth-seeking process will be irreparably subverted, denying opposing parties a full and fair hearing." 145 F.R.D. at 284. [2]

Pursuing this theme in its Post-trial Motion[3] and supporting Memorandum of Law, Emerson argued that the trial court's "failure to impose any sanction against plaintiff for its spoliation of evidence and to afford defendants any relief to discover the nature and extent of plaintiff's spoliation of evidence deprived defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions."[4] Plaintiff's Answer to Post-Trial Motion spe-

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[2] Memorandum of Law in Support of the Motion for Summary Judgment at 15 n.4. Emerson repeated the same arguments in its Motion in Limine and supporting Memorandum of Law arguing that plaintiff's conduct "has effectively eliminated Defendant's ability to present evidence to the jury as to the actual cause of the fire," *id.* at 14, and contending: "It is difficult to imagine a case where Plaintiff's conduct in spoliating evidence is more egregious or more irreparably harmed the opposition...", *id.* at 15.

[3] Motion for Post-trial Relief ¶83 and ¶84. See App. at 63a.

[4] Memorandum of Law in Support of Motion for Post-trial Relief at 27. The same Memorandum maintained that the spoliation, and lack of sanction, "have combined to deny Emerson ... a fair opportunity to conduct the defense of this case in accordance with the principles of due process guaranteed by the Constitutions of the United States and Pennsylvania." *Id.* at 38 (citing U.S. Supreme Court decisions and devoting several pages to the due process question).

cifically denied that Emerson had been deprived of due process under the United States and Pennsylvania Constitutions.[5] Emerson's Reply Memorandum reasserted that its due process rights had been violated.[6]

At the start of the appellate process, Emerson provided, as required by Pa.R.App.P. 1925(b), a "concise statement of matters complained of on appeal." In so doing, Emerson argued that "the Court's failure to impose any sanction against Plaintiff based on its spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions."[7] Throughout the proceedings in the Pennsylvania intermediate appellate court, Emerson pressed its arguments rooted in due process and fundamental fairness. See, e.g., Appellant's Brief to the Superior Court of Pennsylvania at 4, 18, and 24 (arguing that Emerson was "substantially prejudiced," that it was deprived "of the ability to defend and mount an effective defense," and that the destruction of fire scene evidence deprived Emerson "of a fair opportunity to defend itself"). Emerson thus repeatedly invoked its fundamental fairness objection to plaintiff's spoliation and the failure of the Pennsylvania courts to provide a remedy for that destruction of evidence. This Court has recognized that, in developing its argument, a party need not necessarily refer to due process in so many words when the underlying ruling whose fairness is in dis-

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[5] Answer of Plaintiff ¶83 and ¶84. See App. at 67a.

[6] Reply and Supplemental Memorandum of Law in Support of the Motion for Post-Trial Relief at 9-10.

[7] Concise Statement of Matters Complained of on Appeal ¶ 40.. See App. at 71a.

pute comprises the idea of federal due process. See *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Braniff Airways v. Nebraska*, 347 U.S. 590 (1954).

In the Supreme Court of Pennsylvania, Emerson explicitly invoked its due process argument. In the important "Statement of the Issues Presented" portion of its brief, Emerson noted that a question before the court was whether the lack of a remedy for plaintiff's spoliation "violates the Defendant's rights to due process and a fair trial." Appellant's Brief to the Supreme Court of Pennsylvania at 4. Emerson pointedly invoked both federal and state due process before the Pennsylvania Supreme Court, in arguing that "Emerson was denied fundamental rights guaranteed to all litigants in this country and throughout this Commonwealth: the rights to due process and a fair trial after a balanced investigation of all relevant facts." *Id.* at 44. The reference to "all litigants in this country" was, of course, an invocation of federal due process, and the reference to litigants "throughout this Commonwealth" was an invocation of due process under the state constitution.

The Pennsylvania courts repeatedly have held that concepts of due process under the Pennsylvania Constitution and the Federal Constitution are coextensive. See, e.g., *Pennsylvania Game Comm'n v. Marich*, 542 Pa. 226, 229 n.6, 666 A.2d 253, 255 n.6 (1995)("the requirements of Article I, Section I of the Pennsylvania Constitution are not distinguishable from those of the 14th Amendment"); *Willcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 590, 55 A.2d 521, 526 (1947)(Article I, Section 1 of the Pennsylvania Constitution is substantially equivalent to the federal due process clause); *Griffin v. SEPTA*, 757 A.2d 448, 452 (Pa. Commw. Ct. 2000) (in circumstances where plaintiff argued that statutory cap on damages violates the substantive due process guarantees of both the Pennsylvania and federal constitutions, court saw no need to separately analyze the two constitutions "as the substantive due process protections afforded under both constitutions are analyzed the same and thus are coextensive.") Emerson's repeated references to violations of "due process" sufficiently preserved this issue for appeal to this Court, since in reviewing Pennsylvania cases, there is no occasion to wonder whether a reference to "due process," either in parties' briefs or in a court's opinion, invites due process analysis independent of that found in federal cases. Cf. *Michigan v. Long*, 463 U.S. 1032 (1983).

Finally, in its Application for Reargument to the Pennsylvania Supreme Court, Emerson sought to ensure that the Pennsylvania courts had the fullest opportunity to explore the due process issue. See App. at 6a. ("the essence of the constitutional guarantee of due process is fundamental fairness in view of all of the facts and circumstances in a case"); *id.* at 9a (due process requires "that some relief – either in

the form of dismissal, preclusion of expert testimony or some other type of sanction – be afforded to Emerson in order to neutralize the clear prejudice that had been caused by Plaintiff's actions"); *id.* at 9a-102a. (the "effect of plaintiff's destruction of the fire scene was to subvert the adversary system and the rules of discovery, and therefore to deprive Emerson of its right to a fair trial and due process of law").

REASONS FOR GRANTING THE WRIT

I. The Decision Below Violates the Due Process Clause Since It Allows One Party To Control What Evidence Is Available To Be Admitted at Trial.

The Pennsylvania Supreme Court's decision violates basic notions of due process. In this case, the Church and its insurer, who controlled the fire scene for months after the fire, were allowed to preserve only evidence which supported *their* theory of the case and to destroy all other evidence long before notifying the target defendant, Emerson. By permitting such flagrant and unjustified spoliation, without any consequences, the Pennsylvania Supreme Court has given its blessing to this widespread technique for subversion of the adversary process, and has permitted substantial deprivation of Emerson's opportunity to be heard in a "meaningful" manner.

The Fourteenth Amendment command that no state shall "deprive any person of life, liberty, or property, without due process of law" distills centuries of Anglo-American juris-

prudence.[8] In his famous argument in the Dartmouth College case (1819), Daniel Webster declared that the "law of the land" (another way of talking about due process of law) requires a law "which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 517, 581 (1819).

Due process is bound up with notions of fundamental fairness. Modern cases have declared that, at its minimum, due process requires notice and hearing. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[9] As Justice Felix Frankfurter noted, the "validity and moral authority of a conclusion largely depends on the mode by which it was reached." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). More concretely, due process requirements of notice and hearing aim at accuracy in fact-finding so that "substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The requirement of a fair hearing is not satisfied, of course, by a shell or facade. The hearing must be meaningful. In particular, a party must not, through no fault of his own, be precluded from arguing the merits of his case. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The

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[8] Chapter 39 of Magna Carta (1215) forbade proceedings save by "the law of the land" – a phrase which soon became synonymous with "due process of law."

[9] Due process is also taken to require a neutral and disinterested magistrate. *Tumey v. Ohio*, 273 U.S. 510 (1927).

essence of a meaningful hearing lies in a party's ability to present evidence supportive of his arguments in the case. In *Little v. Streater*, 452 U.S. 1 (1981), the mother of a newborn infant claimed *Little* was the father. In the ensuing paternity suit, *Little,* claiming indigence, asked that blood tests be performed at the state's expense, but that motion was denied. This Court reversed, reasoning that *Little* had been denied "the most probative additional evidence" needed to rebut the mother's testimony. This amounted to the denial of a "meaningful opportunity to be heard" and thus a failure to satisfy the due process requirement of "fundamental fairness." 452 U.S. at 12, 16. Emerson is not, of course, asking the state to pay for evidence. But the parallel between the present case and *Little* is striking. By not imposing any sanction for spoliation, Pennsylvania has essentially denied Emerson "the most probative additional evidence" needed to support its case. A party barred from seeking critical evidence does not, of course, have to show that the evidence, if admitted, would lead to a successful outcome for that party. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 512, 544 (1985). But the requirement of a "meaningful hearing" means that the party must not be pushed into the ring with one hand tied behind its back.

It is commonplace to be reminded that the requirements of due process vary with the circumstances of the proceeding. See, e.g., *Hannah v. Larche*, 363 U.S. 420, 441-42 (1960). The state has legitimate interests to be considered. But the Court's "balancing" of government and private interests most often takes place in the context of administrative, rather than judicial, proceedings. In such cases, the "ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be

tutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)(holding that an evidentiary hearing was not required prior to termination of Social Security disability payments). Holdings in cases like *Mathews* turn in good part on the government's interest in "conserving scarce fiscal and administrative resources" lest the cost of extensive administrative hearings diminish resources available for the social program itself. 424 U.S. at 348.

No such concerns are involved in the present case. The question is not whether there should have been a judicial forum; there was. The question is whether, having made the state courts available to a plaintiff like Mt. Olivet, the state can then use its evidentiary rulings to deny the defendant, Emerson, a meaningful hearing.

This Court is understandably sparing in exercising its powers of review where procedural rules in state civil proceedings are involved. But where life, liberty, or property are involved – and the money judgment against Emerson undeniably takes property from Emerson – it is the Constitution, not state law, which is the measure of due process of law. The state defines causes of action, creates courts and agencies, delineates jurisdiction, and defines rules of evidence and procedure. But, all the same, the state must respect federal constitutional guarantees such as due process of law.

It is not often that the Supreme Court has to oversee a state court paternity proceeding. But it did that in *Little v. Streater*, 452 U.S. 1 (1981). It is not often that the Court has

to review how states go about suspending drivers' licenses. But, despite the Court's sensitivity to the state's interest in highway safety, the Court undertook such review in *Bell v. Burson*, 402 U.S. 535 (1971).

This is a case about fundamentals. Petitioner invokes a right long deemed central to the constitutional guarantee of due process of law. The courts must be more than merely open to litigants. The rules of the game must assure a meaningful hearing, including providing a remedy for a party unable to present crucial evidence because of the conscious action of the other party. Otherwise the Constitution's sonorous guarantee of due process becomes "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Plaintiff, its insurance company, and its counsel deprived Emerson of the opportunity to defend itself against plaintiff's claims when the fire scene was destroyed -- even though plaintiff had long before identified Emerson as the target but deliberately chose not to notify Emerson of the fire or the existence of a potential claim against Emerson.

By analogy, the Pennsylvania Supreme Court's decision flies in the face of the Sixth Amendment right to confront one's accusers:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide

> where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Taylor v. Illinois, 484 U.S. 400, 409 (1988) (*quoting Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this is not a criminal case, Emerson is no less entitled to a fair trial than is a criminal defendant. Nonetheless, plaintiff's actions effectively prevented Emerson from confronting its accusers and presenting a defense.

This Court has recognized that the procedures mandated by due process vary "according to specific factual contexts," that "not all situations calling for procedural safeguards call for the same kind of procedure." [10] Nevertheless, it is obvious that this situation demanded that *some* relief – either in the form of dismissal, preclusion of expert testimony, or some other type of sanction – be afforded to Emerson in order to neutralize the clear prejudice that had been caused by plaintiff's actions. And, to the extent that this decision was based on Emerson's lack of proof on the issue of prejudice, this decision places an unreasonable, if not insurmountable, burden on the non-spoliating parties to produce proof of prejudice in circumstances where evidence has been destroyed.

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[10] *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

II. Spoliation Is an Issue Worthy of This Court's Attention Since It Is on the Increase Nationwide, and the Judiciary's Response Too Often Is Inadequate To Protect Parties' Right to Fundamental Fairness.

Spoliation has never been more of a problem than it is today. Its roots lie deep in the common law.[11] But in recent years, there seems to have been an explosion of spoliation cases in both state and federal courts. [12] Sad to say, it is also a problem of ethical proportions. A survey of litigators found spoliation of evidence to be "a prevalent practice." Indeed, one-half of litigators believe that "unfair and inadequate disclosure of material information prior to trial" is a "regular and frequent problem."[13] A knowledgeable scholar/practitioner laments that spoliation is a "growing litigation practice which threatens to undermine the integrity of

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[11] An especially famous case is *Armory v. Delamirie*, 1 Stra. 505, 93 Eng. Rep. 664 (King's Bench 1722).

[12] For example, recent decisions in a wide variety of jurisdictions attest to the fact that spoliation of fire scenes by subrogated insurance carriers, as occurred in the instant case, is commonplace. See *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995); *Austin v. Mitsubishi Electronics America, Inc.*, 966 F. Supp. 506 (E.D. Mich. 1997); *Cohen Bros. Realty v. J.J. Rosenberg Electrical Contractors Inc.*, 697 N.Y.S. 20 (N.Y. App. Div. 1999); *Northern Assurance Co. v. Ware*, 145 F.R.D. 281 (D. Me. 1993); *Mayes v. Black & Decker, Inc.*, 931 F. Supp. 80 (D.N.H. 1996); *Puccia v. Farley*, 699 N.Y.S.2d 576 (N.Y. App. Div. 1999); *Am. States Ins. Co. v. Tokai-Seiki Ltd.*, 704 N.E. 2d 1280 (Ohio C.P. 1997)

[13] Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 598-99 (1985).

civil trial process. It is a form of cheating which blatantly compromises the ideal of the trial as a search for truth."[14]

The response, in the first instance, to spoliation as an abuse of the trial process lies, of course, with trial judges. A classic remedy is for the trier of fact to draw an adverse inference that the spoliator has a "well-founded" fear that the evidence, if produced, would be harmful to his case. See *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir. 1982). [15] As Judge (now Justice) Breyer has said, an adverse inference serves two purposes. One is evidentiary -- the "common sense observation" about the behavior of those who destroy relevant evidence. The other is prophylactic and punitive -- deterring parties from destroying evidence and penalizing those who do. 692 F.2d at 218.

The proliferation of spoliation cases has brought a range of remedies, adverse inferences being only one of them.[16] Judicial responses to spoliation have been described as being on a course of "prolific, divergent evolution," cutting a broad

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[14] Charles R. Nesson, *Incentives To Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 Cardozo L. Rev. 793 (1990).

[15] To the same effect, see 2 *Wigmore on Evidence* §291, at 228 (Chadbourn rev. 1979).

[16] Remedies include, in addition to adverse inferences, discovery sanctions, either under a court's inherent power or under rules such as Fed. R. Civ. P. 37; statutes punishing obstruction of justice, see, e.g., 18 U.S.C. §401 (2003) and 18 U.S.C. §1503 (2003); and tort statutes. See generally *Destruction of Evidence* (Gorelick, Marzen, and Solum eds. 1989).

swath across the landscape of procedures and remedies.[17] One commentator has criticized judges for minimizing the problem of spoliation; they indulge, he says, in "hollow rhetoric and mild sanctions."[18] Another commentator thinks he sees in recent judicial decisions the beginning of a nationwide "anti-spoliation trend," although he confesses that he sees no clear patterns. [19] And still another states that many practitioners "believe that the issue of spoliation is not worth pursuing because many judges treat such abuses mildly and seldom impose any meaningful sanctions on a violator."[20] Specifically, spoliators frequently suffer no penalty or minimal punishment for their actions.[21] So confusing is the spoliation landscape that federal courts sitting in diversity cases do not even agree on whether spoliation is a substantive matter, thus governed by state law, or is a procedural matter to which federal guidelines (such as a federal court's inherent power to sanction parties) apply.[22] Yet it could not be more obvious that (1) subrogated litigators have a powerful eco-

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[17] ALI-ABA Continuing Legal Education, "Spoliation of Evidence -- Recent Developments," SE99 ALI-ABA 601, 611 (2000).

[18] Nesson *supra* n.14 at 793.

[19] David A. Bell et al, *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation,* 28 Ariz. St. L.J. 769, 771 (1997).

[20] See Randell C. Ogg & Matthew P. Maloney, *Aggressive Pursuit of Spoliation Reaps Rewards*, Prod. Liab. L. & Strategy 4.4 (Jan. 1997).

[21] See Jay E. Rivlin, Note, *Recognizing Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 Hofstra L. Rev. 1003, 1014 (1998).

[22] See *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994). See also *Chambers v. NASCO, Inc.*, 501 U.S.32, 43-46 (1991).

nomic incentive to spoliate in the current legal climate where the risks of severe sanctions are *de minimus,* and (2) spoliation is a calculated tactic by sophisticated carriers which is fundamentally unfair to the target defendant. As one federal court observed:

> This is not a case in which the conduct of a lay person, inexperienced in . . . litigation, has resulted in the destruction of evidence. This is a case brought by an insurance carrier . . . Insurance companies are no strangers to litigation, and it seems likely that Plaintiff had litigation in mind when, very soon after the fire, it had its own expert examine the site . . . Knowing what it did [after its investigation], Plaintiff was palpably remiss in failing to make reasonable arrangements within the range of possibility to preserve the evidence.

Northern Assurance Co. v. Ware, 145 F.R.D. 281, 283-84 (D. Me. 1993).

The issues at stake here go beyond the facts of this case. Unless the decision below is reversed, plaintiffs in Pennsylvania and elsewhere will have carte blanche to destroy exculpating evidence in any fire scene – or, for that matter, any other type of product case -- without any fear of sanction or punishment so long as they can convince a jury (through the use of one-sided evidence) that it was the targeted product which caused the damage. The rights of the innocent, non-spoliating party cannot be ignored if our adversarial system is to be preserved as a viable and robust means for achieving just results.

Inevitably, remedies for spoliation will continue to evolve through legal and policy judgments made by state and federal courts, as well as by legislators. Like the common law out of which they were born, spoliation rulings will turn heavily on fact situations as perceived by trial and appellate judges. What is missing from all this, however, is the recognition that, at some point, spoliation decisions become a constitutional matter -- a question of the limits imposed by due process of law. Even as the perception of, and remedies for, spoliation take shape, it is essential that state and federal courts understand that the failure to provide a remedy for spoliation can violate principles of fundamental fairness and thus deny due process. Emerson's case poses just such a challenge to those constitutional limitations. This case thus offers an apt opportunity for this Court to remind lawyers and judges alike that dubious behavior, making a fair trial impossible, is more than a matter for judicial discretion. In more extreme cases, like this one, it is a matter of constitutional law.

CONCLUSION

Emerson respectfully requests that this Court grant its petition.

Respectfully submitted,

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March 27, 2003

APPENDIX A – SUPREME COURT ORDER, DATED DECEMBER 27, 2002

[J-152-2002]

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

Mount Olivet Tabernacle Church,	:	No. 20 EAP 2002
Appellee	:	Appeal from the Order of the Superior Court entered on August 13, 2001(reargument
v.	:	denied October 19, 2001) affirming the judgment of the Court of Common Pleas of
Edwin Wiegand Division; Emerson Electric Company,	:	Philadelphia County, Civil Division, entered on October
Appellant	:	18, 1999 at No. 2446 November Term 1996
	:	781 A.2d 1263 (Pa.Super. 2001)
	:	ARGUED: October 21, 2002
	:	APPLICATION FOR REARGUMENT

ORDER

PER CURIAM

AND NOW, this 27th day of December, 2002, the Application for Reargument is denied.

Mr. Justice Eakin did not participate in the consideration or decision of this matter.

APPENDIX B – APPLICATION FOR REARGUMENT, DATED NOVEMBER 27, 2002

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 20 EAP 2002

MT. OLIVET TABERNACLE CHURCH,
Appellee,

v.

E. WIEGAND DIVISION, EMERSON ELECTRIC CO.,
Appellants

Appeal of the Order of the Court of Common Pleas of Philadelphia County dated and entered September 17, 1999, No. 2446, November Term 1996

APPLICATION FOR REARGUMENT

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I. ORDER IN QUESTION

See Appendix A hereto.

II. STATEMENT OF ISSUE REQUIRING REARGUMENT

By affirming the Superior Court's decision, this Court has allowed Plaintiff to prevail notwithstanding its decision to destroy a fire scene and all exculpatory evidence before notifying Emerson that a fire had occurred or that Emerson was the target for liability, thereby depriving Emerson of its fundamental right to a fair trial and due process of law .

III. CONCISE STATEMENT OF THE REASONS FOR ALLOWANCE OF REARGUMENT

A. Introduction

E. Wiegand Division, Emerson Electric Company ("Emerson"), seeks reargument following the decision by this Court affirming the decision of the Superior Court, which let stand, in its entirety, a jury verdict rendered in the Court of Common Pleas, Philadelphia County. The action involved a fire scene that Plaintiff thoroughly examined and destroyed, except for the evidence that Plaintiffs believed supported its theory of liability against Emerson. The fire scene was destroyed after Plaintiff and its insurance company identified Emerson as the target but before notifying Emerson of the fire or the existence of a potential claim against Emerson, thereby depriving Emerson of an adequate opportunity to defend itself and rebut the evidence

offered against Emerson. Thus, Emerson was denied access to critical exculpatory evidence of other potential sources of origin of the fire.

The effect of Plaintiff's destruction of the fire scene was to subvert the adversary system and the rules of discovery, and therefore to deprive Emerson of its right to a fair trial and due process of law. As a result, this Petition for Reargument should be granted to correct this fundamental injustice.

B. Background of the Case

A fire occurred at the Mt. Olivet Tabernacle Church in Philadelphia on Thanksgiving weekend 1994. Post-fire investigation by adjusters for the Church and Church Mutual, its insurance company, focused on an immersion heater used by the Church to heat water in a baptismal font. While Emerson was identified by Plaintiff's agents as the manufacturer of the principal component part of the immersion heater within days of the fire, Emerson *was not notified* of the fire or any potential claim against it until September 30, 1996 --- almost two years after the fire and three months after the entire fire scene, except for the immersion heater and such other evidence as supported Plaintiff's theory of causation, was destroyed. That the fire scene was left intact for more than nineteen months after the fire but destroyed immediately before Emerson was put on notice demonstrated that the scene was destroyed with the

intention of depriving Emerson of a meaningful opportunity to defend itself.[1]

Before trial, Emerson repeatedly asserted that Plaintiff's spoliation of the scene and critical evidence unfairly prohibited Emerson from investigating the scene and examining other alternative causes of the fire. As a result, Emerson asserted that it had been prevented from preparing what would have been its best defense to Plaintiff's claims. Emerson's pre-trial attempts to bring this spoliation to the trial court's attention -- and to obtain some relief by way of dismissal of the claims or some other sanction -- were to no avail. Emerson reiterated its position at trial, for example by asking for an adverse inference jury instruction -- *i.e.*, an instruction that would have allowed the jury to presume that the missing evidence would have been harmful to Plaintiff -- but that request, too, was denied by the trial court.

The jury returned a verdict in favor of Plaintiff and against Emerson in the amount of $981,000. Thereafter, Emerson filed post-trial motions on a number of grounds -- including the trial court's failure to issue any sanction in response to Plaintiff's spoliation and the trial court's erroneous intended use instruction -- but these post-trial motions were denied. On appeal, a three-judge panel of the Superior Court by opinion dated August 13, 2001, affirmed the trial court's decision. Judge Del Sole filed a concurring opinion in support of affirmance. Thereafter, Emerson filed a timely

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[1] This is the subrogation case, brought by Church Mutual, the carrier for Mt. Olivet Tabernacle Church.

Petition for Reargument with the Superior Court, which was denied on October 19, 2001. Emerson then filed a Petition for Allowance of Appeal to this Court, which was granted. After briefing and argument, by per curiam order dated November 13, 2002, this Court affirmed the Superior Court's decision. Emerson now applies for reargument.

C. Emerson Was Deprived of a Fair Trial and Due Process of Law

Emerson's fundamental right to a fair trial and due process of law is implicated by this Court's decision affirming the Superior Court's decision. Due process is required by the state and federal constitutions, *Philadelphia Gas Works, Inc.*, 1 A.2d 156, 331 Pa. 321 (1938), and the essence of the constitutional guarantee of due process is fundamental fairness in view of all of the facts and circumstances in a case. *Gresock v. City of Pittsburgh Civil Service Commission*, 689 A.2d 163 (Pa. Cmwlth. 1997).

Through a calculated strategy, Plaintiff, its insurance company and its counsel deprived Emerson of the opportunity to defend itself against Plaintiff's claims when the fire scene was destroyed -- even though Plaintiff had long before identified Emerson as the target but deliberately chose not to notify Emerson of the fire or the existence of a potential claim against Emerson.

Emerson's fundamental right to a fair trial and due process cannot be overstated. In analogous situations in the criminal context, the United States Supreme Court has established a rule that the government has a duty - known as the "*Brady*

rule" - to disclose material, exculpatory evidence to the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). The failure to disclose this information is a violation of due process. *Id.* A criminal conviction in a case where exculpatory evidence has not been disclosed to the defense will be overturned if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*

There is no rational basis for applying a different rule in civil cases. Emerson, like the criminal defendant in *Brady*, was intentionally denied potentially exculpatory evidence by Plaintiff's acts, and the trial court and the Superior Court and this Court on appeal have declined to give Emerson any remedy whatsoever. It cannot be seriously disputed that the entire fire scene had to be examined in order to establish the cause and origin of the fire and that the portions of the scene which were destroyed could have contained exculpatory evidence.[2] Emerson submits that this exculpatory evidence could have resulted in a defense verdict and Plaintiff's unilateral destruction of this evidence deprived Plaintiff of a

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[2] For example, as set forth in Emerson's Brief before this Court which is incorporated herein by reference, evidence was presented that Alverita Spain, who was preparing food in the kitchen that morning, had heard a loud noise behind the walls in the kitchen and smelled smoke coming from an area remote from the baptismal font where Emerson's product was located. Ms. Spain called the fire department based on what she heard and smelled. Plaintiff's spoliation prevented Emerson from investigating this source of the fire.

fair trial. If this decision is permitted to stand, it would be the first reported fire scene case in which no sanction whatsoever was issued for a plaintiff's destruction of relevant evidence. This cannot and should not be the law in Pennsylvania.

Along similar lines, this Court's decision flies in the face of the Sixth Amendment right to confront one's accusers:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Taylor v. Illinois, 484 U.S. 400, 409 (1988) (*quoting Washington v. Texas*, 388 U.S. 14, 19 (1967)). Although this is not a criminal case, Emerson effectively has been prevented from confronting its accusers and from presenting a defense since Plaintiff chose not to preserve any exculpatory evidence.

Absent reargument, this Court would effectively announce a sweeping new spoliation rule in this Commonwealth which sends a strong message: a Plaintiff who seeks, in a product liability case, to prove that a product caused a fire is now

permitted to intentionally destroy *all other relevant evidence* (including, in a fire scene case, evidence regarding possible alternative fire sources) before notifying the target that the evidence even exists, without fear of retribution or punishment so long as this Plaintiff is able to convince a jury that it was the product (and not some unknown -- and because of the destruction unknowable -- alternative cause or origin) that sparked the fire.

While courts recognize that due process is a concept that is "flexible and calls for such procedural protections as the particular situation demands, *McKean Public Sewer Assoc. v. Pennsylvania Infrastructure Investment Authority*, 796 A. 2d 379 (Pa. Cmwlth. 2002) it is obvious that this situation demanded that some relief – either in the form of dismissal, preclusion of expert testimony or some other type of sanction be afforded to Emerson in order to neutralize the clear prejudice that had been caused by Plaintiff's actions.

Such a sanction will not punish the Church -- it has already been paid and its facilities rebuilt. Rather, the sanction of dismissal or other appropriate punishment will directly affect the insurance company who paid the claim, assumed the Church's rights against Emerson and ordered destruction of the fire scene. And it is this insurance company which is likely to spoliate again, in the future, if not sanctioned here.

D. Conclusion

The effect of Plaintiff's destruction of the fire scene was to subvert the adversary system and the rules of discovery, and

therefore to deprive Emerson a fair trial and due process. The issues in this case transcend the facts presented here; if this case is not reversed, plaintiffs and their insurance companies and adjusters will now have *carte blanche* to destroy exculpating evidence in any fire scene without any fear of sanction or punishment so long as they can convince a jury (through the use of one-sided evidence) that it was the targeted product which caused the damage.

As a result, this Petition for Reargument should be granted to correct this fundamental injustice.

Respectfully submitted,

LAMB, WINDLE & McERLANE, P.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I am on this day serving the foregoing Petition for Reargument upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail addressed as follows:

Richard W. Yost, Esq. November 27, 2002
Yost & Tretta
Two Penn Center Plaza
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Gaele McLaughlin Barthold, Esq. November 27, 2002
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APPENDIX C- SUPREME COURT PER CURIAM ORDER, DATED NOVEMBER 13, 2002

[J-152-2002]

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

Mount Olivet Tabernacle Church,	:	No. 20 EAP 2002
Appellee	:	Appeal from the Order of the Superior Court entered on August 13, 2001(reargument denied October 19, 2001) affirming the judgment of the Court of Common Pleas of Philadelphia County, Civil Division, entered on October 18, 1999 at No. 2446 November Term 1996
v.	:	
Edwin Wiegand Division; Emerson Electric Company, Appellant	:	
	:	781 A.2d 1263 (Pa.Super. 2001)
	:	ARGUED: October 21, 2002

ORDER

PER CURIAM DECIDED: November 13, 2002

The Order of the Superior Court is affirmed. The Petition for Permission to File Post-Submission Communication in Accordance with Pa.R.A.P. 2501(a) is granted.

Mr. Justice Eakin did not participate in the consideration or decision of this case.

APPENDIX D – SUPERIOR COURT OPINION, DATED AUGUST 13, 2001

2001 PA Super 232

Mount Olivet	:	In the Superior Court
of Tabernacle Church,	:	Pennsylvania
	:	
Appellee	:	
v.	:	
Edwin L. Wiegand Division	:	
Emerson Electric Company	:	
	:	
Appellants	:	No. 3183 EDA 1999

Appeal from the Judgment Entered October 18, 1999 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. November Term, 1996/No. 2446

BEFORE: DEL SOLE, P.J., EAKIN and LALLY-GREEN, JJ.

OPINION BY LALLY-GREEN, J.: Filed: August 13, 2001

1. Appellant, the Emerson Electric Company, Weigand Division,[1] appeals from the judgment entered October 18, 1999, in favor of Plaintiff/Appellee, Mount Olivet Tabernacle Church (the Church). We affirm.

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[1] The parties and the court occasionally refer to Wiegand and Emerson as separate entities. For consistency and convenience, however, we will refer to Wiegand and Emerson singularly as "Appellant."

2. The factual background of the case is as follows. Appellant manufactured and distributed a Chromalox Model TLC-210 Immersion Heater, which the Church used to heat water in a large baptismal pool. On November 26, 1994, a fire erupted in the Church building, causing extensive damage in the stipulated amount of $981,000.00. On November 22, 1996, the Church filed a complaint against Appellant, alleging that the heater was defective and that the heater caused the fire.

3. Specifically, the Church alleged the following. A church employee filled the baptismal font and turned on the heater. The water drained from the pool, but the heater did not shut off. The heater reached extremely high temperatures and burned the bottom of the empty baptistery; the fire then spread to other parts of the building. The Church further alleged that the heater was defectively designed because it lacked safety warnings and safety devices such as a thermocouple and a low-water shutoff.

4. The case proceeded to trial from May 10 – May 14, 1999. The jury found that the heater was defective and that the heater was the proximate cause of the damage. The jury awarded $981,000.00 to the Church. Appellant's post-trial motions were filed on May 24, 1999, and denied on September 21, 1999. On October 18, 1999, judgment was entered on the verdict.[2]

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[2] After delay damages were added, the final verdict amount was $1,093,122.76.

This appeal followed.[3]

5. Appellant raises three issues on appeal:

> 1. Whether the lower court committed reversible error warranting a new trial when it failed to properly instruct the jury, in accordance with controlling Pennsylvania precedent, that the product manufactured by Emerson was defection if – and only if – the product, at the time it left Emerson's control, was unsafe for its "intended use," rather than "unsafe for use" as the lower court erroneously instructed.
>
> 2. Whether the lower court committed reversible error and/or abused its discretion warranting JNOV or a new trial, when it failed to dismiss Plaintiff's claims, failed to grant Emerson's request for a spoliation inference jury instruction an/or failed to impose any sanction upon Plaintiff as a consequence of Plaintiff's intentional destruction of critical fire scene

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[3] Appellant filed its notice of appeal on October 14, 1999. Judgment was not entered on the verdict until October 18, 1999. Appellant's notice of appeal was premature because an appeal properly lies from the entry of judgment, not from the denial of post-trial motions. *Fetherolf v. Torosian,* 759 A.2d 391, 392 n.1 (Pa. Super. 2000), *citing, Johnston the Florist, Inc. v. TEDCO Construction Corp.,*441 Pa.Super. 281, 657 A.2d 511, 514 (1995). Nevertheless, we will entertain the appeal because judgment has been entered on the verdict. *Id.*

evidence, where that destruction prevented Emerson from identifying other potential causes of the fire and as a result, substantially prejudiced Emerson's ability to prepare a defense.

3. Whether the lower court abused its discretion or erred in permitting Plaintiff to introduce at trial highly prejudicial and inflammatory evidence of alleged other fires involving similar heaters thus suggesting to the jury that the subject product had been previously adjudicated a fire hazard, where the lower court ultimately ruled that the incidents were *not* similar at all.

Appellant's brief at 4.

6. First, Appellant argues that the trial court committed reversible error by instructing the jury that the jury must determine whether the heater was "safe for use," rather than "safe for its intended use." Appellants' Brief at 21. Specifically, Appellant claims that the omission of the word "intended" relived the jury from determining "whether the heater was intended to be used for the purpose to which it was put." *Id.* Appellant further alleges that they presented at trial "substantial and uncontroverted testimony establish[ing] that use in a baptistry font was not an intended use of this heater." *Id.* at 22.

7. In the instant case, the challenged instruction in relevant part reads as follows: "If you find that the heater at the time it left the defendant's control lacked any element to make it

safe for use or contained any condition that made it unsafe for use, then the heater was defective and the defendant is responsible for any harm caused by that defect." N.T., 5/14/99, at 1224-1225.

8. The purpose of a jury charge is to clarify the legal principles at issue. *General Equip. Mfrs v. Westfield Ins. Co.*, 430 Pa. Super. 526, 635 A.2d 173, 184 (1993), *appeal denied,* 644 A.2d 1200 (Pa. 1994). Thus, a jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations. *Von der Heide v. Commonwealth DOT*, 553 Pa. 120, 718 A.2d 286, 289 (1998). It is well established that a trial judge is bound to charge the jury only on the law applicable to the factual parameters of a particular case and that it may not instruct the jury on inapplicable legal issues. *Schaefer v. Stewartstown Dev. Co.*, 436 Pa. Super. 354, 647 A.2d 945, 947 (1994). "Thus, 'instructions given to a jury must be confined to the issues raised in the pleadings and the facts developed by the evidence in support of such issues.'" *Id.*, *quoting*, *Heymann v. Electric Service Mfg. Co.*, 412 Pa. 338, 194 A.2d 429, 432 (1963).

9. As most recently stated by this court in *Phillips v. Cricket Lighters*, 2001 PA. Super 109, ¶22 773 A.2d 802: "There are Three elements in [a] products liability action: 1) the product must be defective; 2) the defect must be a substantial factor in causing plaintiff's injuries; and 3) the defect must exist at the time the product left defendant's control." In certain cases, it is appropriate for the jury to be specifically instructed that the product must be made safe for

its "intended use." *Marshall v. Philadelphia Tramrail Co.*, 626 A.2d 620, 426 Pa. Super. 156, 626 (1993), *appeal denied,* 538 Pa. 635, 647 A.2d 511 (1993), *citing, Azzarello v. Black Bros Co.*, 480 Pa. 547, 391 A.2d 1020 (1978). On the other hand, inclusion of the word "intended" is not always necessary for a proper instruction. For example, where there is no evidence that the product was used in an improper or unintended manner, the trial court need not instruct the jury on "intended use." *Id.*, *see also*, *Craley v. Jet Equip. & Tools, Inc.*, 2001 Pa. Super 171, ¶¶15-16; *Sheehan v. Cincinnati Shaper Co.*, 382 Pa. Super 579, 555 A.2d 1352, 1356 (1989), *appeal denied*, 523 Pa. 633, 564 A.2d 1261 (1989).

10. The record reflects that the intended use of the product was to heat liquids. Appellant's Director of Sales Engineering testified that the intended use of the product was to heat water or a water based solution. N.T., 5/13/99, at 823. Indeed, the product could be used to heat water in a baptistry. *Id.* Appellant generally does not know how purchasers will use the product after it is sold; however, "they could use it for almost anything that they wanted." *Id.* at 826-827.

11. Appellant's only other witness, a fire expert, opined that the fire did not begin in the baptistry. *Id.* at 888. Appellant's counsel stated in closing argument that the issue was not whether the product was intended for use in a baptistry:

> Now, I told you in the beginning this case is not whether this is a baptistry heater or not. It's not. But the reality is that somebody put this into a

> system, added all this heavy duty wiring and these components and made it work just fine in this baptistry for more than twenty years. And it still would be working if it hadn't been for that fire.

N.T., 5/14/99, at 1187 (emphasis added). Appellant's counsel argued that the fire did not start in the baptistry, recounted the testimony offered by the fire expert and pointed to the evidence which bolstered the expert's opinion.

12. Thus, the testimony of Appellant's own witnesses and counsel's closing argument did not suggest an unintended use. Rather, Appellant sought to establish that: (1) the heater worked properly on the day of the fire; (2) the heater was not the cause of the fire; and (3) the fire started elsewhere in the church. Finally, as noted above, the intended use of the product was as a water heater. It is undisputed that the Church used the product as a water heater. Because the evidence did not support an instruction on intended use, the trial court did not err by failing to provide such an instruction. *See, Marshall* and *Craley*. Appellant's first claim fails.

13. Appellant next assets that the trial court erred in failing to provide any sanction for the spoliation of evidence.[4]

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[4] Appellant raised this issue two times before trial. On October 5, 1998, Appellant filed a motion for summary judgment seeking to dismiss the case with prejudice as a spoliation sanction. The trial court denied this motion on November 16, 1998. On April 22, 1999, Appellant filed a motion in limine proposing a different sanction for the Church's spoliation: identifying the Church's

Unlike most cases involving spoliation, the product itself was not destroyed or missing. Rather, Appellant contends that the Church and/or its insurer intentionally and wrongfully destroyed the *fire scene* before providing Appellant with a full and fair opportunity to examine the scene. Appellant claims that it was severely prejudiced because its primary defense was that the fire started elsewhere in the church and not within the baptistry.

14. Specifically, Appellant argues as follows. Shortly after the November 26, 1994 fire, the Church knew that the heater was a "prime suspect" as the cause of the fire. The Church and its insurer developed this theory through expert reports and photographs, specifically targeting the heater as the source of the fire. After the Church settled with its insurer in November 1995, the Church and/or its insurer destroyed the fire scene and did not photograph or preserve evidence tending to establish other sources of the fire. Moreover, the insurer knew long before the scene was destroyed that it had a potential subrogation claim against Appellant. Indeed, the insurer brought the instant products liability action against Appellant, with the Church as the named plaintiff. The insurer first notified Appellant of its claim on September 30, 1996, after the fire scene had been demolished. For these reasons, Appellant claims the trial court erred in failing to impose a spoliation sanction, such as dismissing the Church's case.

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insurance company as the real party in interest. The trial court denied this motion on May 6, 1999.

15. When reviewing a court's decision to grant or deny a spoliation sanction, we must determine whether the court abused its discretion. *Croydon Plastics Co. v. Lower Bucks Cooling & Heating*, 698 A.2d 625, 629 (Pa. Super. 1997) ("the decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court"), *appeal denied,* 553 Pa. 689, 717 A.2d 1028 (1998). "An abuse of discretion is not merely an error in judgment; rather it occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill-will." *Pilon v. Bally Eng'g Structures*, 645 A.2d 282, 285, 435 Pa. Super.227, *appeal denied,* 539 Pa. 680, 652 A.2d 1325 (1994).

16. *In Schroeder v. DOT*, 551 Pa. 243, 710 A.2d 23 (Pa. 1998), our Supreme Court adopted the spoliation-of-evidence standards set forth by the Third Circuit Court of Appeals in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. Pa. 1994), According to *Schmid*, the spoliation doctrine is broadly applicable to cases where "relevant evidence" has been lost or destroyed:

> Since the early 17th century, courts have admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated. Jamie S. Gorelick, Steven Marzen and Lawrence Solum, Destruction of Evidence, § 2.1 (1989). Such evidence permitted an inference, the "spoliation inference", that the destroyed evidence would have been unfavorable to the position of the

offending party. As Judge Breyer put it in *Nation-wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982), "the evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the document." As Judge Breyer also noted, the spoliation inference is also seen as having "prophylactic and punitive effects." *Id.* The admissibility of spoliation evidence and the propriety of the spoliation inference is well established in most jurisdictions, including Pennsylvania. *See e.g.*, *Nation-Wide Check Corp.*, 692 F.2d 214 (1st Cir. 1982); *Mensch v. Bic Corp.*, 1992 WL 236965 (E.D. Pa. 1992) (citing Pennsylvania cases); Gorelick, *et al., supra,* § 2.24.

. . .

We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See e.g., Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th

> Cir. 1993); *S.D.I. Operating Partnership, L.P. v. Neuwirth*, 973 F.2d 652 (8th Cir. 1992); Gorelick, *et al, supra,* § 3.16, p. 117 ("To fulfill the purposes of discovery sanctions . . . – that is, to restore the accuracy of the trial, compensate innocent victims, and punish guilty spoliators – courts select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.")

Schmid, 13 F.3d at 78-79 (citations omitted).

17. Thus, the reasoning of *Schmid* applies not only to cases where the product is lost or destroyed, but also to cases where alternative potential causes of the accident are lost or destroyed. *See, Pia v. Perrotti*, 718 A.2d 321 (Pa. Super. 1998), *appeal denied,* 558 Pa. 621, 737 A.2d 743 (Pa. 1999).[5] Such evidence is certainly "relevant" to a products liability

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[5] In *Pia*, 718 A.2d at 323, a produce warehouse caught fire. Various experts inspected the scene and ultimately concluded that the fire may have been related to inadequate tightening of wires inside a metering cabinet. *Id.* The plaintiffs preserved this evidence, but tenants of the building then removed all of the remaining electrical equipment, including machinery and wires near the source of the fire in the southwest corner of the building. *Id.* The defendant, who was charged with negligence for failure to tighten the wires in the metering cabinet, sought and received a jury instruction on spoliation. *Id.* at 324. Specifically, the trial court instructed the jury that "if these [destroyed] materials had been retained and had been able to have been inspected by the

defense, even if the case may center primarily on the narrower question of whether or not the product itself was defective. *Baliotis v. McNeil*, 870 F.Supp, 1285, 1290 (M.D. Pa. 1994).

18. In the instant case, the trial court conducted a spoliation analysis. First, the court determined that there was "No negligence or bad faith on the part of the plaintiff." Trial Court Opinion, 6/28/2000, at 8. Next, the court found that Appellant suffered relatively little prejudice for several reasons: (1) the actual product was not destroyed or missing; (2) "there are voluminous documents and photographs of the actual fire scene, thus reducing the need for an on scene inspection"; and (3) the Philadelphia Fire Department conducted its own investigation and determined the cause of the fire. *Id.* Finally, the court concluded that the drastic sanction of dismissal sought by Appellant was unwarranted under these circumstances. *Id.*

19. Under the specific circumstances of this case, we see no abuse of discretion. We begin with an analysis of fault. Fault has two components: responsibility, and the presence or absence of bad faith. *Pia*, 718 A.2d at 324; *Baliotis*, 870 F.Supp. at 1290; *Henkel Corp. v. Polyglass USA, Inc.*, 194 F.R.D. 454, 456-457 (E.D.N.Y. 2000).

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defendants, that evidence from those materials would have been unfavorable to the party that made them unavailable." *Id.* The jury found in favor of the defendant. This Court conducted a full spoliation analysis and ultimately found no abuse of discretion in the trial court's issuance of a spoliation instruction. *Id.* at 325.

20. As to the first component, we note that a plaintiff has a general duty to preserve relevant evidence where: (1) the plaintiff knows that litigation against the defendants is pending or likely; and (2) it is foreseeable that discarding the evidence would be prejudicial to the defendants. *Baliotis*, 870 F.Supp. at 1290, *citing, Hirsch v. General Motors Corp.*, 266 N.J. Super 222, 628 A.2d 1108, 1114 (Law Div.1993). *Cf. Schmid*, 13 F.3d at 81 (the plaintiff does *not* have a responsibility to identify all potential defendants and invite them to attend an "exploratory investigation"). These principles hold true regardless of whether the plaintiff is an insured or an insurer pursuing a subrogation action. *Id.* The plaintiff's power to control the scene and to exercise authority over the preservation or destruction of evidence is a relevant factor in determining responsibility. *Pia*, 718 A.2d at 324; *Howell v. Maytag*, 168 F.R.D. 502, 506 (M.D. Pa. 1996).

21. Of course, "the scope of the duty to preserve evidence is not boundless." *Baliotis*, 870 F.Supp. at 1290. At a minimum, if the plaintiff knows that a particular party is potentially responsible, in the absence of exigent circumstances the plaintiff should provide this party with the opportunity to inspect the evidence. *Id.* at 1291.[6] Similarly, if the plaintiff's investigation reveals that a particular product may be the cause of the fire, the plaintiffs should preserve

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[6] As in *Pia*, we decline to announce a blanket rule that "a plaintiff must in every case preserve the entire fire scene." *Pia*, 718 A.2d at 325.

the product itself. If the investigation reveals alternative potential sources of the fire, these alternative sources should be preserved because they present clearly relevant defense evidence. *Pia*, 718 A.2d at 325.

22. If, on the other hand, the investigations of the plaintiff and independent experts reveal *no* alternative sources of the fire, the plaintiff may be considered less at fault for failing to preserve the entire fire scene, because there is no clearly relevant defense evidence to preserve (aside from the allegedly-defective product itself). *See*, *id.* at 324 (party considered less at fault for failing to preserve scene where "she simply preserved what she had been informed was important"). This is not to say that a spoliating party is necessarily blameless in such a situation. For example, where the victim of a fire has identified a potentially responsible party, particularly in the early stages of the investigation, it may be just and reasonable to notify such a party so that the party can conduct a full and complete investigation, untainted by spoliation. *Howell*, 168 F.R.D. at 506-507. In other words, a fire scene may contain evidence of alternative sources of the fire that were overlooked by the plaintiff's investigators or third parties. *Henkel,* 194 F.R.D. at 456. In the final analysis, however, we conclude that a party's responsibility for preserving the entire fire scene is relatively low where there appears to be only one source of the fire. This is particularly true given the inherent instability and danger posed by unremediated fire scenes. *Baliotis*, 870 F.Supp. at 1292.

23. In the instant case, the Church and its insurer certainly could have afforded Appellant the opportunity to inspect the fire scene, and are not blameless for their failure to do so. *Howell*, 168 F.R.D. 506-507. On the other hand, for the reasons set forth above, we conclude that their responsibility for failing to preserve the entire fire scene is relatively low. *See*, *Baliotis*, 870 F.Supp. at 1290 (insurer bore some responsibility for destroying fire scene, even though all identified sources of the fire were preserved, because the fire scene contained evidence relevant to the issue of causation).

24. A second component of fault is the presence or absence of good faith. *Pia*, 718 A.2d at 324; *Baliotis*, 870 F.Supp. at 1291 (bad faith is not a necessary prerequisite to sanctions for spoliation). In the instant case, the trial court found that the Church did not act in bad faith. After reviewing the record in light of our deferential standard of review, we see no abuse of discretion in this conclusion.[7]

25. Next, we turn to the issue of prejudice. It is commonly accepted that a defendant suffers some measure of prejudice if it is precluded from conducting its own independent investigation of a fire scene to determine alternate causes. *Pia*, 718 A.2d at 325; *Baliotis*, 870 F.Supp. at 1291; *Henkel*, 194 F.R.D. at 457. *See also*, *Schmid*, 13 F.3d at 80

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[7] Of course, courts do have the discretion to determine that a party acts in bad faith where that party deliberately orders a fire scene to be destroyed without allowing a known potential tortfeasor to examine the scene. *See*, *Henkel*, 194 F.R.D. at 457. In the instant case, however, the trial court did not choose to find bad faith.

(generally, in a design defect case, "the defendant will want as much information as possible relevant to the issue of causation").

26. On the other hand, prejudice to the defendant is less severe where potential alternative causes of the accident are speculative. *Schmid*, 13 F.3d at 80; *Henkel*, 194 F.R.D. at 457. Prejudice is less severe where an independent third party expert (such as a fire marshal) has investigated the scene, because in such a situation the defendant need not rely solely on the plaintiff's own investigation to determine the presence or absence of alternative causes. *Howell*, 168 F.R.D. at 507 n.3. Prejudice is also less severe is a design defect case, because the defendant can test and examine multiple products of the same design. *Schroeder*, 710 A.2d at 27-28; *Schmid*, 13 F.3d at 80. Finally, our courts have recognized that a defendant in a fire scene case is rarely precluded from presenting a defense to the plaintiff's claim. This is true because the defendant can cross-examine the plaintiff's experts and call its own experts to render opinions based on the plaintiff's evidence. *Pia*, 718 A.2d at 325; *Baliotis*, 870 F.Supp. at 1291. In this respect, the defendant is protected by the fact that the plaintiff has the burden of proving both a defect and causation, *Schroeder*, 710 A.2d at 27.

27. In the instant case, the factors recited above indicate that Appellant suffered a relatively low degree of prejudice. The record reveals that Appellant presented a vigorous defense to the Church's theory of causation, and presented a renowned fire expert to render an opinion based on the Church's

evidence. The investigations of the Church and the fire marshal did not reveal an alternative source of the fire; thus, the failure to preserve the entire scene resulted in only a speculative degree of prejudice. Finally, because this was a design defect case, Appellant had a reasonable opportunity to examine other products under similar circumstances.[8] For all of these reasons, we see no abuse of discretion in the trial court's conclusion that Appellant suffered relatively little prejudice.

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[8] Appellant contends that the instant case was not a classic design defect case, where experts on both sides could study the product and debate whether it had an inherent defect. Appellant's Brief at 31-32. Rather, Appellant contends that "plaintiff's entire proof came from the fire scene which Plaintiff destroyed without giving Defendant the opportunity to examine it." *Id.* at 32. In other words, Appellant argues that the case centered primarily on whether the fire started in the baptistry, rather than whether the product was defective. While we understand Appellant's position, the fact remains that the Church had the burden of proving that the product had a design defect. The jury found that the product was defective, and Appellant raises no argument on appeal directly challenging this determination. Thus, we see merit to the Church's argument that "[t]he product in question was preserved and Emerson had ample opportunity to inspect and test it or any other comparable products. However, apparently recognizing that it could not defend the design of its product, Emerson chose to take the position that its product did not cause the fire and that the fire did not even start in the baptistery. This is a 'fire scene case' only to the extent that Emerson made a strategic decision to make it one, in an unsuccessful attempt to divert attention away from its defective product." Church's Brief at 32.

28. In light of the trial court's determinations of fault and prejudice, we also see no abuse of discretion in its decision to refrain from issuing sanctions that would have the effect of dismissing the Church's case. Generally, courts should select the least onerous sanction commensurate with the spoliator's fault and the other party's prejudice. *Schmid*, 13 F.3d at 79. Where fault and prejudice are not severe, dismissal is inappropriate. *Schroeder*, 710 A.2d at 27-28; *Pia*, 718 A.2d at 325; *Schmid*, 13 F.3d at 81.[9] Thus, we conclude that the trial court did not abuse its discretion in failing to impose this sanction.

29. Appellant argues that the trial court erred by failing to impose *any* sanction, including lesser sanctions such as a spoliation instruction to the jury.[10] The record reveals that Appellant did request a spoliation instruction, but the court did not provide one. We note that in cases similar to this one, a spoliation instruction is often granted because it is considered the least onerous penalty commensurate with the plaintiff's degree of fault and the defendant's prejudice. *Pia*, 718 A.2d at 325; *Baliotis*, 870 F.Supp. at 1293; *Henkel* 194

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[9] We note that in *Henkel*, a fire scene case where the trial court ruled that the plaintiff was highly culpable and the prejudice to the defendant was severe, the court still declined to dismiss the case because such a sanction was considered too punitive. *Henkel*, 194 F.R.D. at 457.

[10] A spoliation instruction permits the jury to infer that "the destroyed evidence would have been unfavorable to the position of the offending party." *Schmid*, 13 F.3d at 78.

F.R.D. at 457; *Howell*, 168 F.R.D. at 508. While the trial court certainly would have been within the bounds of its discretion to grant such a sanction, we cannot conclude that its failure to do so was so erroneous as to constitute an abuse of discretion. *See, Pilon*, 645 A.2d at 285 ("an abuse of discretion is not merely an error in judgment; rather it occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill-will"). Moreover, even if the court should have granted a spoliation instruction, Appellant has demonstrated no prejudice in the court's failure to so instruct. Appellant's second claim fails.

30. Appellant's final claim is that the trial court committed reversible error when it permitted the Church to offer testimony concerning other fires involving immersion heaters. Specifically, the Church called (as on cross examination) Donald M. Cunningham, a former engineer and current consultant to Emerson. N.T., 5/12/99, at 518. Before he testified, the Church's counsel indicated that he would ask Mr. Cunningham questions about other fires involving immersion heaters. *Id.* at 513-514. Appellant objected that this testimony would constitute a surprise because Appellant first learned of this proposed line of questioning on the previous afternoon. *Id.* at 512, 515. Appellant also indicated that the court should first conduct an evidentiary hearing to determine whether the incidents and products were similar. *Id.* at 513. The trial court replied, "let's begin the trial testimony and we will see what develops." *Id.* at 516.

31. The Church's counsel questioned Mr. Cunningham at length in an attempt to establish that immersion heaters manufactured by Emerson were involved in other church fires. N.T., 5/12/99, at 534-554. Mr. Cunningham consistently testified that the heaters at issue in those cases were "different," or that they were component parts of a manufactured system built by another company. *Id.* at 543, 547-548.[11] The witness was also questioned about other lawsuits brought against Appellant involving fires in which another company used one of Appellant's heaters in the manufacturing of a system. The witness responded that Appellant was dismissed from the case in two of these incidents and that in the third case, the jury ruled in favor of Appellant. *Id.* at 616-617. After Mr. Cunningham was excused, Appellant moved to strike "all of the testimony concerning other fires and other products," but the court denied this motion. *Id.* at 619-620.

32. Before closing argument, Appellant asked the court to preclude the Church's counsel from referring to the other church fires. N.T., 5/13/99, at 1155. The trial court agreed. *Id.* The Church's counsel did refer to other church fires, but the court overruled Appellant's objection to this reference. Id. at 1204. The court did, however, grant Appellant a supplemental jury charge regarding the evidence of other fires. Id. at 1145-1146. The court instructed the jury:

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[11] In the presence of the jury, the court commented to the Church's counsel that "I want proof . . . that was are talking about the same heater, and I haven't heard it yet." *Id.* at 544.

Members of the jury, you may recall that I permitted Mr. Yost to cross-examine Mr. Cunningham regarding other fires involving the heater in question. Now, from time to time we do permit this type of evidence. And we permit the attorneys to offer this subject by laying a proper foundation. Now, when I talk about laying a proper foundation what I'm saying is that evidence is only admissible if it's relevant. By relevant, we mean important. And evidence should not be admitted if it may prejudice the other side, in this case the defendants.

Evidence of other fires was admissible only if Mr. Yost could establish that the evidence concerns incidents sufficiently similar to the fire involving the church and occurred under sufficiently similar circumstances.

If Mr. Yost has failed to satisfy the burden on this issue, then I instruct you to disregard the evidence in its entirety. You may not consider these factors and the similar products involved in those fires in reaching your decision. There simply is no evidence that those fires which do not involve this type of heater had any bearing on plaintiff's claims in this case.

N.T., 5/14/99, at 1209-1210.

33. Appellant argues that the trial court erred by allowing the jury to hear the line of questioning involving other fires

and other heaters because the court did not first hold an *in camera* hearing to determine whether the other incidents were sufficiently similar to the instant case. "While evidence of other occurrences involving an allegedly defective product may be admissible in the plaintiff's case in chief to show (1) the existence of a defective condition, (2) causation, or (3) notice of the defect, such evidence is admissible only if the plaintiff *first* establishes a substantial similarity of conditions between the prior incident and the incident giving rise to the plaintiff's cause of action." *Spino v. John S. Tilley Ladder Co.*, 448 Pa. Super. 327, 671 A.2d 726, 735 (1996) (emphasis added), *affirmed,* 548 Pa. 286, 696 A.2d 1169 (1997). "The admission of such evidence is tempered by judicial concern that the evidence may raise collateral issues which confuse both the real issue and the jury. To constitute reversible error, a ruling on evidence must be shown to be erroneous and harmful to the complaining party." *Harkins v. Calumet Realty Co.*, 418 Pa. Super. 405, 614 A.2d 699, 705 (1992).

34. We recognize the possibility that an open-ended, argumentative exploration of *possible* similar incidents will confuse the jury and prejudice the defendant with the taint of unproven prior incidents. *See*, *Spino*, 671 A.2d at 735. Rather than conduct this line of questioning in the presence of the jury, an *in camera* hearing is advisable. *See*, *id.* This process allows the trial court to determine which particular incidents (if any) are relevant to the instant case, and to limit the plaintiff's line of questioning to those incidents that have already been deemed relevant by the court. ***Id.*** In short, we

disapprove of the trial court's decision to allow the Church's counsel to "shoot first and ask questions later."

35. Nevertheless, the testimonial evidence offered by Mr. Cunningham did not prove to be prejudicial to Appellant. Mr. Cunningham distinguished the facts and the use of the heaters in other cases and did not testify or suggest that Appellant's product caused other fires. To the extent the posing of the questions themselves prejudiced Appellant, the trial court corrected that error in its instruction to the jury. The jury was advised to ignore this line of questioning and was specifically told not to consider the relationship of other similar products and other fires in its deliberations. Generally, in the absence of extraordinary circumstances, a prompt and effective curative instruction which is "directed to the damage done" will suffice to cure any prejudice suffered by the complaining party. *See*, *Siegal v. Stefanyszyn*, 718 A.2d 1274, 1277 (Pa. Super. 1998), *appeal denied,* 59 Pa. 693, 739 A.2d 1059 (Pa. 1999).[12] Such is the case here.

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12 Appellant argues that the curative instruction itself was inadequate. This issue is waived because Appellant did not raise a prompt objection to the curative instruction. *See*, *Burnhauser v. Bumberger*, 745 A.2d 1256, 1259 (Pa. Super. 2000); *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491, 508 (Pa. 1995) (when an objection is sustained and a cautionary instruction is given, and the defendant fails to object to the cautionary instruction or to request any further instruction, counsel is presumed to be satisfied with the cautionary instruction and any prejudice is cured, because we further presume that the jury

Moreover, juries are presumed to heed a court's curative instructions. *Commonwealth v. Simpson*, 754 A.2d 1264, 1272 (Pa. 2000), *cert. denied,* 2001 U.S. LEXIS 4757. Under these circumstances, a new trial is not warranted.

36. Judgment affirmed.

37. DEL SOLE, President .Judge., files concurring

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follows the court's instructions), *cert. denied,* 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996).

CONCURRING OPINON BY DEL SOLE, P.J.:

1. I agree with the Majority's ruling affirming the judgment entered in the favor or the Church. However I believe the Majority's spoliation analysis is unnecessary.

2. The doctrine of spoliation applies to cases in which the product is damaged or missing. *Roselli v. General Electric Co.*, 410 Pa. Super. 223, 599 A.2d 685 (Pa. Super. 1991). In this case the product was preserved. The Church brought this action against Appellants based upon the alleged failure of its product, and the Church preserved that product for purposes of litigation. The Church had the obligation to meet its burden of proof to establish all the elements of a strict liability case by a preponderance of the evidence, including causation. Appellants were free to argue that the product was not defective or that there existed alternative causes for the fire.

However, the Church cannot be held responsible for maintaining the entire fire scene. The Church, like other fire victims, wished to rebuild. It was entirely reasonable for the Church to take such action. To require fire victims to delay reconstruction until all possible causes are identified, persons are notified and "reasonable time" for inspections expire, places an unnecessary and unreasonable burden on these victims. Such delay would require that the victims secure their premises, postpone reconstruction and endure further disruption in their lives. In my judgment, this is not

necessary where the party making the claim has preserved the product it alleges caused the damage.

3. Contrary to the Majority's position I do not find instructive this court's decision in *Pia v. Perrotti*, 718 A.2d 321 (Pa. Super. 1998). There a fire destroyed the appellant's warehouse. The investigators could not determine the origin of the fire, although it was known that it resulted from an electrical malfunction in the southwest corner of the building. Appellant preserved only a metering cabinet, which it claimed housed wires which the appellees had inadequately tightened. The trial court gave a spoliation instruction due to the appellant's failure to preserve the other electrical connections and electrical items located in close proximity to the metering cabinet.

4. In this case, the investigation led to the baptistry heater. The heater and all items related to the heater were preserved and available for Appellants' inspection. Appellants' claim, regarding a lack of access to the entire fire scene, differs significantly from the facts of *Pia*.

5. Because the facts of this case did not warrant a spoliation analysis, I concur in the Majority's decision which finds no error on the part of the trial court.

APPENDIX E- JUDGE DiBONA OPINION, DATED JUNE 28, 2000

In the Court of Common Pleas
First Judicial District of Pennsylvania
Civil Trial Division

Mount Olivet Tabernacle Baptist Church	:	November Term, 1996
v.	:	
Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company and Russell's Electric Service and John Doe	:	NO. 2446

OPINION

DI BONA, J. June 28, 2000

This is an appeal taken by the defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company from this Court's Order dated September 17, 1999 which denied the defendants' Motions for Post-Trial Relief. The instant matter proceeding to trial before

this Court and a jury on May 7, 1999. After a six-day trial, the jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $981,000. Thereafter, plaintiff filed a Petition for Delay Damages which was granted by this Court. Delay damages in the amount of $112,122.76 were awarded to plaintiff and added to the jury's verdict.

This case involves a subrogation action filed by Mount Olivet Tabernacle Church on November 22, 1996. The plaintiff's claims arise out of a devastating fire which occurred at the church on November 26, 1994. The plaintiff claimed that the fire was caused by a defective Chromalox Model TLC-210 Immersion Heater which was manufactured and distributed by the defendants Emerson and Weigand. The portable heater was used by the plaintiff to heat water in the baptismal pool. At trial the plaintiff proceeded under a theory of strict liability in tort and claimed that the Chromalox heater was defective because it lacked proper and adequate safety warnings and instructions and because it was not manufactured with safety components such as low water cut off, sludge legs and a high temperature control. Both parties produced expert witnesses and testimony relating to the cause of the fire and the defective nature of the product. Prior to the conclusion of trial, counsel for both parties stipulated to the amount of damages awardable to plaintiff, if the jury found in its favor. On May 14, 1999 the jury found that the product was defective and that the defective product was the cause of the plaintiff's damages. Therefore, the jury returned a verdict in favor of the plaintiff in the amount of

$981,000, the amount of damages stipulated to by the parties.

Thereafter, the defendants filed Post Trial Motions in the nature of Motions for a New Trial and Motions for Judgment N.O.V. After the submission of briefs and after oral argument on the motions, this Court denied said motions. This appeal followed.

On appeal, the defendants raise numerous allegations of trial court error. The first of these allegations relates to the sufficiency of the evidence and the Court's failure to grant a new trial because the verdict was against the weight of the evidence. In *Craft v. Hetherly,* ___ Pa. Super. ___, 700 A.2d 520 (1997) it was held that:

> In *Thompson v. City of Philadelphia*, 507 Pa. 592, 493 A2.d 669 (1985), our Supreme Court, in a detailed analysis, set forth the scope and standard of review to be employed when reviewing a trial court's decision to grant a new trial, as follows:
>
> > This Court has repeatedly emphasized that it is not only a trial court's inherent fundamental and salutary power, but its duty to grant a new trial when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice. *Burchard v. Seber,* 417 Pa. 431, 438, 207 A.2d 896, 899 (1965); *Frisina v. Stanley,* 409 Pa. 5, 7, 185 A.2d 580, 581 (1962); *Kiser v. Schlosser,* 389 Pa. 131, 133, 132 A.2d 344, 345 (1957). Although

> a new trial should not be granted because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion, a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Burell v. Philadelphia Electric Company*, 438 Pa. 286, 265 A.2d 516 (1970).

700 A.2d 520 at 521.

The defendants contend that the expert testimony produced by plaintiff as well as the testimony of the defendant's expert dictates that a new trial, should be awarded to defendants because the weight of the evidence favors the defendants. During the trial, the plaintiff produced the testimony of two fire cause experts and one electrical engineer. These experts were involved immediately after the fire and were thoroughly familiar with the fire scene and the investigation as to the cause and origin of the fire. Through the testimony of these witnesses and the documentary and physical evidence, it was proven that the Emerson immersion heater was defective in its design and manufacture because it did not contain the necessary safety features to make the product safe for the ultimate user thereof. The Plaintiff also established that the product did not contain any warnings to the ultimate user of the potential fire hazards associated with the foreseeable use thereof. A thorough review of the record in this case reveals that it is more than sufficient to support the jury's verdict. This

verdict is not so contrary to the evidence as to shock the Court's sense of justice. The verdict for the plaintiff was not a miscarriage of justice in that sufficient credible evidence was presented by the plaintiff to warrant a finding that the defendants' product was defectively designed and manufactured. The motion for a new trial was, therefore, appropriately denied.

Next, the defendants contend that this Court erred in denying the defendants Motion for Judgment N.O.V. In the case of *United States Fidelity and Guaranty Co. v. Royer Garden Center and Greenhouse, Inc., et al.,* 143 Pa. Cmwlth. 31, 598 A.2d 583 (1991) it was held that:

> Our scope of review of a trial court's decision denying motions for judgment n.o.v. or for a new trial is limited to determining whether the trial court abused its discretion or committed an error of law. *Paxton Hollow* [143 Pa.Cmwlth. 41] *Estates, Ltd. v. Lower Paxton Township*, 93 Pa.Cmwlth.Ct. 468, 501 A.2d 1175 (1985). When deciding whether a judgment n.o.v. is warranted, this Court must consider evidence and any conflicts in evidence in the light most favorable to the verdict winner who is afforded the benefit of all reasonable factual inferences that arise from the evidence. *Sacco v. City of Scranton*, 115 Pa. Commonwealth Ct., 512, 540 A.2d 1370 (1988), petition for allowance of appeal denied, 524 Pa. 601, 568 A.2d 1251 (1989). Moreover, where the jury has been presented with conflicting evidence,

> a motion for judgment n.o.v. must be denied. *Moore v. City of Philadelphia,* 131 Pa. Commonwealth Ct. 586, 571 A.2d 518 (1990), petition for allowance of appeal denied, 527 pa. 589, 588 A.2d 511 (1991). In fact, a judgment n.o.v. will be granted only in clear cases in which "facts are such that no two reasonable persons could fail to agree that the verdict was improper." *Id.* at 592, 571 A.2d at 521.

In reviewing the above standards and applying same to the instant case, defendants base their Motion on two theories, the first of which is that plaintiff's evidence failed as a matter of law to prove that the product was defective and the actual cause of the fire. It has been held on many occasions that proof in a strict liability case requires two elements: that the product was defective and that the defective product was the proximate cause of the damage. The evidence submitted by plaintiff more than adequately proves both of these items and the jury found that the product was defective and the actual cause of the fire. Next, the defendant contends that a judgment n.o.v. should have been granted by this Court as a sanction against plaintiff for its spoliation of evidence and the resulting prejudice to the defendants in their inability to defend this action. The entire line of Pennsylvania cases relating to sanctions for the spoliation of evidence was recently reviewed by our Supreme Court in *Schroeder v. Com. of PA, Department of Transportation*, 551 Pa. 243, 710 A.2d 23 (1998) wherein it was held:

The Third Circuit Court of Appeals addressed the appropriate sanction for the spoliation of evidence in a design defect case in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). In *Schmid*, the plaintiff's expert altered an alleged defectively-designed product and the district court sanctioned the plaintiff by striking the expert's testimony. On appeal, the Third Circuit recognized that a common penalty for spoliation is a jury instruction allowing an inference that the missing evidence would have been unfavorable to the party that destroyed it. *Id.* at 78. The court viewed prohibiting the expert's testimony as an extreme sanction. *Id.* at 79.

In deciding the proper penalty for the spoilation of evidence, the Third Circuit found relevant (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *Id.* Applying these factors, it held that barring all expert testimony because the expert disassembled the product to examine it was excessive. [551 Pa. 251] *Id.* at 81. It found that the expert's fault was slight and that the prejudice to the opposing party was not great because the plaintiff alleged a design defect common to all products of the same model. Id.

Having considered this authority, we adopt the Third Circuit's approach to the spoliation of evidence in *Schmid.* Fashioning a sanction for the spoliation of evidence based upon fault, prejudice, and other available evidence sanctions will discourage intentional destruction. The plaintiff's burden of proof at trial to establish that a defective product caused his injury will protect defendants in cases where it is determined that summary judgment is not warranted based upon spoilation.

Applying the *Schmid* factors to this case, the product liability defendants are not entitled to summary judgment. With respect to fault, there is a factual dispute as to Schroeder's counsel's efforts to preserve the truck. While Edward Margala of Margala & Sons maintains that his agreement to preserve the truck ended in August of 1991, there is also evidence reflecting Schroeder's counsel's understanding that Margala & Sons was to preserve the truck after that date and bill her the cost of storage.

Although recognizing this dispute of fact, the trial court nonetheless found Schroeder's counsel, however, asked Margala & Schroeder at fault for signing over the truck's title to her insurance company before filing suit. Sons to preserve the truck before title was transferred. There is no evidence of the circumstances surrounding the transfer of title. Although Schroeder's action

ultimately led to the loss of [551 Pa. 252] the truck, the summary judgment motions do not support that the transfer was negligent or in bad faith. Given the request for preservation before the transfer and the conflicting evidence as to how long the preservation was to last, we cannot conclude, as our lower courts did, that Schroeder's fault entitles Appellees to summary judgment.

The second and third elements of the *Schmid* test also dictate that summary judgment is inappropriate. Since Schroeder's product liability claim is based upon a design defect common to all trucks of its kind, the prejudice to the Appellees is not great. They can comparably test and examine other trucks for the alleged design defect. See *Schmid*, 13 F.3d 76 (discussing minimal prejudice in design defect cases).

Since Appellees may test and inspect other trucks for the alleged design defect, a lesser sanction such as a jury instruction on the spoliation inference is warranted. Appellees may present evidence of spoliation at trial and the court may instruct the jury that it may infer that the trucks' parts would have been unfavorable to Schroeder. In addition, Appellees may present evidence about the trucks' alleged modification after its sale. While Appellees may be unable to present some evidence related to causation without examining the truck in the accident, the burden of proof

remains with Schroeder to prove that a product defect caused her harm. Thus, summary [551 Pa. 253] judgment is not warranted for the product liability defendants on the basis of spoliation of evidence.

Appellee PennDOT is also not entitled to summary judgment on this basis. As discussed above, summary judgment is not warranted due to Schroeder's fault. In addition, applying the second *Schmid* factor, PennDOT suffers less prejudice from the loss of the product than the product liability defendants. While PennDOT also may be unable to establish other theories of causation of the accident, PennDOT can defend the claims brought against it since they have to do with the condition of the roadway and not the truck itself. Thus, under the third *Schmid* factor, a lessor sanction such as instructing the jury on the spoliation inference is proper. Since Schroeder's claims against PennDOT have to do with the condition of the roadway, summary judgment for PennDOT based upon the spoliation of the truck is particularly inappropriate.

In sum, we adopt the test in *Schmid* to determine the appropriate sanction against a party who fails to preserve a product that is the subject of litigation. Applying the *Schmid* test here, summary judgment is not warranted in favor of the product liability defendants or PennDOT.

In reviewing the claims of the defendants that a judgment n.o.v. should be entered due to the plaintiff's spoliation of evidence (demolition and elimination of the fire scene), this Court was mindful that the same issue was presented pre-trial to Judge Bernstein by way of Motion for Summary Judgment and to this Court by way of Motion of Limine. Both pre-trial motions were denied. In conformity with the prior rulings and in compliance with the standards enunciated in *Schroeder*, this Court refused to grant the defendants Motion for Judgment N.O.V. The spoliation doctrine should not apply to the instant products case wherein a design defect is alleged. There is little or no prejudice suffered by the defendants herein since the actual product is neither destroyed or missing. There are voluminous documents and photographs of the actual fire scene, thus reducing the need for an on scene inspection. The Philadelphia Fire Department conducted an immediate inspection of the scene and determined the actual location of and cause of the fire. Whatever minimal prejudice could have been suffered by the defendant due to the elimination of the building does not warrant the drastic sanction sought by the defendants. Since there is no negligence or bad faith on the part of the plaintiff, the Motion for Judgment N.O.V. was appropriately denied.

Next, the defendants contend that the trial court erred in permitting the plaintiff to cross examine the defense expert witnesses regarding pre and post incident fires involving Emerson heaters. The concept of similar accidents and similar defect was discussed in the case of *Majdic v.*

Cincinnati Machine Co., ___Pa. Super. ___, 537 A.2d 334 (1988) wherein it was held that:

It is established in this Commonwealth that a "defective condition" is not limited to defects in the design or manufacture of a product. The test is whether or not the product is equipped with every element necessary to make it safe for use. *Berkebile v. Brantly Helicopter, supra*, at 337 A.2d at 902. In *Berkebile,* our Supreme Court noted:

> [o]ne such element may be warnings and/or instructions concerning use of the product. A seller must give such warning and instructions as are required to inform the user or consumer of the possible risks and inherent limitations of his product. Restatement (Second) of Torts §402A, comment.. If the product is defective absent such warnings, and the defect is approximate cause of the plaintiff's injury, the seller is strictly liable without proof of negligence.

Id. at 337 A.2d at 902.

A product's "defective condition" may be prove through circumstantial evidence such as the occurrence of similar accidents. *Cornell Drilling Co. v. Ford Motor Co.*, 241 Pa.Super. 129, 359 A.2d 822, 827 (1976).Evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances is generally admissible to prove a manufacturer's constructive notice of a dangerous or

defective condition. However, the admission [370 Pa.Super.624] of such evidence is tempered by judicial concern that the evidence may raise collateral issues which confuse both the real issue and the jury. These matters are vested within the sound discretion of the trial court. *Whitman v. Riddell,* 324 Pa.Super. 177, 471 A.2d 521, 523 (1984). To constitute reversible error, a ruling on evidence must be shown to be erroneous and harmful to the complaining party. *Id* at 471 A.2d at 521, quoting *Anderson v. Hughes,* 417 Pa. 87, 208 A.2d 789, 791 (1965).

In this instant case, the plaintiff learned of numerous similar accidents and defects involving immersion heaters and the Emerson defendant in which the defense "team of experts" had testified. These similar incidents, both pre and post sale were brought out during cross examination of the defense experts. In *Majdic* the majority also reviewed the issue of the limits of cross examination on the issue of similar accidents and held that:

> During trial, Cincinnati presented testimony of Richard Griesheimer, a staff engineer and former manager of engineering. On cross-examination, Majdic attempted to cross-examine Mr. Griesheimer concerning the discrepancy between answers to interrogatories which had been filed in [370 Pa. Super. 626] this case by Cincinnati and those which it had filed in a case in another jurisdiction. In the instant case, Cincinnati

answered that it had no knowledge of injuries, other than Majdic's, resulting from the use of its power presses. By comparison, Cincinnati had filed answers to interrogatories in another action in which it listed approximately 60 separate incidents involving the power press, including Majdic's claim. Majdic attempted to use these inconsistencies to impeach Cincinnati's credibility on cross-examination.

"It is well-established that the scope and limits of cross-examination are within the trial court's discretion and the court's rulings thereon will not be reversed in the absence of a clear abuse of discretion or an error of law." *Kemp v. Qualls*, 326 Pa.Super. 319, 473 A.2d 1369, 1371 (1984). After considering Majdic's arguments in support of the requested cross-examination, the trial court refused this line of questioning in light of its previous ruling which excluded evidence of prior accidents. The trial court opined that the materiality and relevance of the cross-examination would be outweighed by its resulting prejudice to Cincinnati.

We conclude that the trial court erred in prohibiting this line of questioning which went to Cincinnati's credibility. The totally different answers filed in the other action by Cincinnati were a proper subject matter for cross-examination on the issue of credibility. We find that the trial court could have restructured the

> questioning to ensure that the jury would not focus its attention on extraneous issues in light of the trial judge's previous ruling. Thus, we find that the trial court abused its discretion on this evidentiary matter.

In light of the holding above, it was permissible to permit the plaintiff to cross examine the defense expert on the issue of prior accidents and defects. The alleged error on this ground was, therefore, appropriately denied.

Next, the defendants contend that the trial Court erred in permitting plaintiff to introduce evidence of an Underwriters Laboratory Standard during a products liability case. The admissibility of testing standards was examined in the case of *Jackson v. Spagnola*, 349 Pa.Super. 471, 503 A.2d 944 (1986) wherein the Superior Court held that:

> The appellant next contend that the trial court erred in admitting evidence of Federal Motor Vehicle Safety Standards, (FMVSS), in a strict liability case under § 402 A of the Restatement (Second) of Torts. This issue is controlled by *Brogley v. Chambersburg Engineering Company*, 306 [349 Pa.Super. 479] Pa. Super. 316, 452 A.2d 743 (1982) which was a products liability case, where this court held that federal regulations intended to enhance safety are admissible. In *Sours v.*

General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) the Court of Appeals held that FMVSS are admissible in strict liability cases under § 402 A of the Restatement (Second) of Torts. The court pointed out that the compliance with FMVSS does not immunize a manufacturer from liability and "compliance is only a guide and not conclusive." 717 F.2d at 1517. The court further stated at 1517:

We hold that GM's alleged compliance with FMVSS 216, along with its other evidence of adherence to industry customs and standards, was properly left for the jurors to factor into the calculus that comprises reasonable design in a case of strict products liability.

The introduction of FMVSS into evidence was proper, although compliance by Volkswagen with the standards is "only a piece of the evidentiary puzzle" and does not grant immunity from strict liability. *Shipp v. General Motors Corp.*, 750 F.2d 418l, 421 (5th Cir. 1985) See also *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978). While compliance with FMVSS is not conclusive as to the absence of liability under a theory of strict liability, compliance is of

> probative value in determining whether there was a defect. In *Bascelli v. Randy, Inc.*, 339 Pa.Super. 254, 488 A.2d 1110 (1985) a strict liability case under Restatement (Second) of Torts, § 402 A, we held that although contributory negligence is not a defense in such a case, evidence of contributory negligence was relevant in showing causation. In the instant case, the jury could consider compliance by Volkswagen with FMVSS in determining whether a defect existed.

Since the existence of or lack of a UL certification is fact which can be considered in determining whether a design defect existed in the Chromolox Heater, the admission of evidence relating to UL certification was proper. The allegation of error premised upon this ruling was, therefore, denied.

Next, the defendants contend that this Court erred in permitting the plaintiff to present two witnesses on the issue of damages when such witnesses were not listed in the plaintiff's pre-trial memorandum. This issue fails for two reasons; first, that the defendant subsequently agreed to a Stipulation on damages which eliminated the effect of the damage testimony of Messrs. Gohean and Sebzda, and second, that the admissibility of evidence and presentation of witnesses is within the sound discretion of the trial judge. See *Com. v. Phillips*, 398 Pa. Super. 58, 580 A.2d 840 (1990). The decision to permit the damage testimony was

not an abuse of discretion in that both parties had notified each other of their intent to present damage testimony and plaintiff had presented such testimony prior to the presentation of Messrs, Gohean and Debzda. Thereafter, the defendants agreed to set the amount of damages at $981,000 by entering into a Stipulation relating thereto. No real prejudice was suffered by the defendants as a result of the testimony of these two witnesses, particularly when the defendant agreed to a Stipulation on damages thereafter. The allegation of error on this ground was, therefore, denied.

The defendants also raise numerous specific allegations of trial Court error regarding the instructions given to the jury. The defendants contend that error was committed both in the points for charge submitted by the defendants which were refused by the trial Court and in the points for charge actually given which were either submitted by plaintiff or as part of the Court's own charge. The standards governing the Court's charge to the jury were recently enunciated in *Burke v. Buck Hotel, Inc.*, ___Pa. Cmwlth. ____ 742 A.2d 239 (1999) in which it was held that:

> We will thus limit our review of the trial court's jury charge to the question of whether the trial court erred in refusing Burke's four requested points for charge. The four points which were not given to the jury by the trial judge concern the foreseeability of the accident. Generally, a trial judge has wide latitude in his or her choice of language when charging a jury, provided that the instruction fully and adequately conveys the

> applicable law. *Birth Center v. St. Paul Companies, Inc.*, 727 A.2d 1144 (Pa.Super. 1999). A refusal to give a proper instruction requested by a party is grounds for a new trial only if the substance of that instruction was not otherwise covered by the trial court's general charge. *Salameh v. Spossey,* 731 A.2d 649 (Pa.Cmwlth. 1999).

See also *Santarlas v. Leaseway Motorcar Transport Co.,*____ Pa.Super.____, 689 A.2d 311 (1997) the Superior Court held that:

> A trial court is bound to charge only on that law for which there is factual support in the record. *Lockhart v. List,* 542 Pa. 141, 147, 665 A.2d 1176, 1179 (1995); *Hamley v. George,* 365 Pa. 543, 76 A.2d 181 (1950). As a general rule, [456 Pa.Super. 38] refusal to give a requested jury instruction containing a correct statement of the law relating to the issues raised by the evidence is grounds for a new trial unless the substance of that point has been covered in the court's charge as a whole. *Ottavio v. Fibreboard Corporation*, 421 Pa.Super. 284, 285, 617 A.2d 1296, 1302 (1992) (*en banc*). A jury charge must be examined in its entirety to determine if there was prejudicial error. *Harkins v. Calumet Realty Company,* 418 Pa.Super. 405, 416, 614 A.2d 699, 705 (1992). Error will be found where the jury was misled or where there was an

> omission which amounts to a fundamental error. *Lockhart, supra* at 147, 665 A.2d at 1179.

689 A.2d 311 at 312-313.

Furthermore, in *Commonwealth v. King*, ____ Pa.____, 721 A.2d 763 (1998) the Supreme Court held that:

> A trial court has broad discretion in phrasing its instructions to the jury and can choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for consideration. *Commonwealth v. Hawkins,* 549 Pa. 352, 391, 701 A.2d 492, 511 (1997), cert. denied, ---- *U.S.* ----, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998). Furthermore, a trial court need not accept counsel's wording for an instruction, as long as the instruction given correctly reflects the law. *Commonwealth of Ohle,* 503 Pa. 566, 582, 470 A.2d 61, 70 (1983). In reviewing a challenged jury instruction, an appellate court must consider the entire charge as a whole, not merely isolated fragments, to ascertain whether the instruction fairly conveys the legal principles at issue. *Commonwealth v. Jones,* 546 Pa. 161, 192, 683 A.2d 1181, 1196 (1996).

721 A.2d 763 at 778-779.

This Court has reviewed the charge as a whole and finds that there either insufficient evidence in the record to

support the plaintiff's requested charge of that the substance or the requested charge was being covered in the language chosen by the Court. The record does not disclose any prejudice suffered by the defendant as a result of the charge given to the jury. This allegation of error was, therefore, denied.

The defendants also contend that this Court erred in permitting plaintiff's expert witnesses to testify outside the scope of their expert reports. The Superior Court has examined the standards applicable to trial judges when determining the extent to which experts can testify outside their reports. In case of *Tiburzio-Kelley v. Montgomery*, ___Pa. Super.____, 681 A.2d 764 (1996) it was held that:

> Rulings on the admission and exclusion of evidence are within the discretion of the trial judge and will not be reversed on appeal absent a manifest abuse of that discretion. [452 Pa.Super. 172] *General Equipment Manufacturers v. Westfield Insurance Company*, 430 Pa.Super. 526, 543, 635 A.2d 173, 182 (1993), allocatur denied, 537 Pa. 663, 644 A.2d 1200 (1994). The admission of expert testimony is a matter within the sound discretion of the trial court, and appellate review of the trial court's action is similarly and correspondingly limited. *Estate of Pew,* 409 Pa.Super. 417, 424, 598 A.2d 65, 69 (1991), allocatur denied, 530 Pa. 645, 607 A.2d 255 (1992) (citing *Mitchell v. Randall*, 368 Pa.Super. 421,

426-27, 534 A.2d 508, 510 (1987)). The decision of the trial judge on the question of the admissibility of expert testimony will not be reversed, remanded, overruled, or disturbed by an appellate court unless there was a clear abuse of discretion or a clear error. *Estate of Pew, supra*, (citing *Mitchell v. Randall, supra).* However, that discretion is not unlimited, and where the ruling of a trial court exceeds those limits and a party is prejudiced thereby, reversible error occurs. See *Swartz v. General Electric*, 327 Pa.Super. 58, 71, 474 A.2d 1172, 1178 (1984).

"Experts may testify at trial concerning matters which are within the fair scope of a pretrial report. The avoidance of unfair surprise to an adversary concerning the facts and substance of an expert's proposed testimony is the primary purpose of the rule requiring that testimony be within the fair scope of the pretrial report." *Pascale v. Hechinger Company of Pennsylvania,* 426 Pa.Super. 426, 435, 627 A.2d 750, 754 (1993) (citations omitted).

In *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 348 Pa.Super. 285, 502 A.2d 210 (1985), this Court noted:

> It is impossible to formulate a hard and fast rule for determining when a particular expert's testimony exceeds the fair scope of his or her

> pretrial report. Rather, the determination must be made with reference to the particular facts and circumstances of each case. The controlling principle which must guide is whether the purpose of Rule 4003.5 is being served. The purpose of requiring a party to [452 Pa.Super. 173] disclose, at his adversary's request, "the substance of the facts and opinions to which the expert is expected to testify" is to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony (Citations omitted).

In other words, in deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response. *Id.* at 290, 502 A.2d at 212-213.

Thus, in determining whether an expert's trial testimony falls within the fair scope of his pre-trial report, the trial court must determine whether the report "provides sufficient notice of the expert's theory to enable the opposing party to prepare a rebuttal witness." *Hickman v. Fruehauf*

> *Corporation,* 386 Pa. Super. 455, 459, 563 A.2d 155, 157 (1989), appeal denied, 528 Pa. 611, 596 A.2d 158 (1991) (citation omitted). The trial court must also inquire "whether there has been surprise or prejudice to the party which is opposing the proffered testimony of the expert, based upon any alleged deviation between the matters disclosed during discovery, and the testimony of such expert at trial." *Trent v. Trotman,* 352 Pa.Super. 490, 502, 508 A.2d 580, 587 91986). "What constitutes surprise and prejudice, however, depends upon the pre-trial particulars of each case." *Augustine by Augustine v. Delgado*, 332 Pa. Super. 194, 199, 481 A.2d 319, 321 (1984). *Walsh v. Kubiak,* 443 Pa. Super. 284, 292-93, 661 A.2d 416, 420-21 (1995) (emphasis supplied). Accord *Pascale v. Hechinger Co. of Pennsylvania,* 426 Pa.Super. 426, 435, 627 A.2d 750, 754 (1993); *Greer v. Bryant*, 423 Pa. Super. 608, 615, 621 A.2d 999, 1003 (1993).

[452 Pa.Super. 174]

This Court is convinced that the expert reports of Messrs, Farley and Quinn, particularly those portions of their reports which indicated the location of the fire and the cause thereof, were sufficient to apprise the defendants of the precise nature of the allegations against which they were required to defend. There was no error in permitting the testimony of the experts which defendants now complain of. There was no prejudice suffered by them in that they had been more

than adequately apprised of the claims against them and the expert opinions as to the cause of the damages sustained. For these reasons, the allegation of error premised upon the expert testimony being outside the scope of the report was denied.

For all of the foregoing reasons, the defendants Motions for a New Trial and for Judgment N.O.V. were denied. The verdict of the jury should be permitted to stand accordingly.

BY THE COURT:

Alfred J. DiBona, Jr.

APPENDIX F – [EXCERPT OF] POST-TRIAL MOTIONS, DATED MAY 24, 1999

MOUNT OLIVET TABERNACLE CHURCH	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
	:	
v.	:	
	:	NOVEMBER TERM, 1996
EMERSON ELECTRIC COMPANY, EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY, RUSSELL'S ELECTRIC SERVICE and JOHN DOE	:	NO. 2446

ORDER

AND NOW, this day of , 1999, upon consideration of the Motion of Defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company, for Post-Trial Relief, and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED. Judgment Notwithstanding the Verdict is hereby entered in favor of Defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company.

BY THE COURT:

_____

J.

SWEENEY & SHEEHAN
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ATTORNEYS FOR: DEFENDANTS
EMERSON ELECTRIC COMPANY AND
EDWIN L. WIEGAND DIVISION,
EMERSON ELECTRIC COMPANY

MOUNT OLIVET TABERNACLE CHURCH	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
v.	:	
	:	NOVEMBER TERM, 1996
EMERSON ELECTRIC COMPANY, EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY, RUSSELL'S ELECTRIC SERVICE and JOHN DOE	:	NO. 2446

[EXCERPT OF] MOTION FOR POST-TRIAL RELIEF OF DEFENDANTS, EMERSON ELECTRIC COMPANY AND EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY

Defendants, Emerson Electric Company (hereinafter "Emerson) and Edwin L. Wiegand Division, Emerson Electric Company (hereinafter "Wiegand"), hereby move this Honorable Court for Post-Trial Relief Pursuant to Pa. R. Civ. P. 227.1, *et. seq.*, specifically, J.N.O.V. or a new trial, and aver in support thereof as follows:

1. Plaintiff, Mount Olivet Tabernacle Church (hereinafter "Mt. Olivet"), commenced this subrogation action for property damage by filing a Complaint in Civil Action on or about November 22, 1996.

. . .

81. Emerson and Wiegand are entitled to Judgment Notwithstanding the Verdict rendered by the jury in this matter because the public policy of this Commonwealth does not support recovery from Emerson and Wiegand under the circumstances of this case.

82. Emerson and Wiegand are entitled to Judgment Notwithstanding the Verdict rendered by the jury in this matter because the Court's failure to impose any sanction against Plaintiff based on its spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions.

83. Emerson and Wiegand are entitled to Judgment Notwithstanding the Verdict rendered by the jury in this matter because the Court's failure to afford Defendants any relief to discover the nature and extent of Plaintiff's spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions.

84. Emerson and Wiegand are entitled to Judgment Notwithstanding the Verdict rendered by the jury in this matter because the Court's failure to afford Defendants any relief to discover the nature and extent of Plaintiff's spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions.

WHEREFORE, Defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company, respectfully request that this Honorable Court

enter an Order in the form attached, Granting their Motion for Post-Trial Relief and directing the entry of Judgment Notwithstanding the Verdict in their favor or, in the alternative, Ordering a new trial as to all claims.

. . .

APPENDIX G – [EXCERPT OF] MT. OLIVET'S ANSWER TOPOST-TRIAL MOTION, DATED JUNE 23, 1999

YOST & TRETTA
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Philadelphia, PA 19102

MOUNT OLIVET TABERNACLE CHURCH v. EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY and RUSSELL'S ELECTRIC SERVICE and JOHN DOE	COURT OF COMMOM PLEAS, PHILA, COUNTY NOVEMBER TERM, 1996 NO. 2446

ORDER

AND NOW, this day of , 1999, upon consideration of the Motion of defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Company, for post trial relief, and plaintiff's response thereto, it is hereby **ORDERED, ADJUDGED** and DECREED that said Motion is hereby **DENIED.**

YOST & TRETTA
BY: RICHARD W. YOST
I.D. 37941
Two Penn Center Plaza
Suite 610
1500 John F. Kennedy Boulevard
Philadelphia, PA 19102

Attorney For: Plaintiff, Mount Olivet Tabernacle Baptist Church

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MOUNT OLIVET TABERNACLE CHURCH
v.
EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY
and
RUSSELL'S ELECTRIC SERVICE
and JOHN DOE

COURT OF COMMOM PLEAS, PHILA, COUNTY
NOVEMBER TERM, 1996
NO. 2446

[EXCERPT OF]
ANSWER OF PLAINTIFF, MOUNT OLIVET TABERNACLE BAPIST CHURCH TO MOTION FOR POST TRIAL RELIEF OF DEFENDANTS, EMERSON ELECTRIC COMPANY AND EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY.

Plaintiff, Mount Olivet Tabernacle Baptist Church, by and through their attorneys, Yost & Tretta, hereby answers Motion of defendants, Emerson Electric Company and

Edwin L. Wiegand Divison, Emerson Electric Company (hereinafter referred to as "Emerson").

82. Denied. It is specifically denied that defendant, Emerson, is entitled to judgment notwithstanding the verdict because public policy of this Commonwealth does not support recovery by the real circumstances of this case. To the contrary, the jury's verdict was supported by the evidence and in accordance with Pennsylvania law.

83. Denied. The allegations contained in paragraph eighty-three are denied as conclusions of law to which no response is required. It is specifically denied that defendant, Emerson, is entitled to judgment notwithstanding the verdict because the Court's failure to impose any sanction against plaintiff based upon spoliation of evidence and/or that any decision deprived defendants of their due process rights guaranteed by the United States and Pennsylvania Constitutions. To the contrary, the Court's many rulings with respect to spoliation and the jury's prompt and unanimous decision make it clear that said decision was correct, and consistent with the overwhelming weight of the evidence in this case.

84. Denied. The allegations contained in paragraph eighty-four are denied as conclusions of law to which no response is required. It is specifically denied that defendant, Emerson, is entitled to afford defendants any relief to discover the nature and extent of spoliation of evidence and/or that any decision deprived defendants of their due process rights guaranteed by the United States and Pennsylvania Constitutions. To the contrary, the Court's

many rulings with respect to spoliation and the jury's decision with respect to same were correct and consistent with the overwhelming evidence in this case.

WHEREFORE, plaintiff, Mount Olivet Tabernacle Church, respectfully requests this Honorable Court deny the defendants' Motion for Post Trial Relief and enter a judgment consistent with the jury's verdict.

II. MOTION FOR NEW TRIAL

85. Plaintiffs hereby incorporate by reference their answers contained in paragraphs one through eight-four, inclusive of this answer, as if same were herein set forth at length.

86. Denied. The allegations contained in paragraph eighty-six are denied as conclusions of law to which no response is required. It is specifically denied that defendant, Emerson, is entitled to a new trial because the jury's verdict was against the weight of the evidence. To the contrary, the weight of the evidence was consistent with the overwhelming evidence in this case which led to a prompt and unanimous jury verdict.

87. Denied. The allegations contained in paragraph eight-seven are denied as conclusions of law to which no response is required. It is specifically denied that the trial Court erred, abused its discretion and/or acted contrary to the law in denying defendant's request to take the factual depositions of Messrs. Gohean, Quinn, Farley and Marshall.

APPENDIX H – [EXCERPT OF] CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL, DATED NOVEMBER 12, 1999

LAMB, WINDLE, & McERLANE, P.C.
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MOUNT OLIVET TABERNACLE CHURCH
v.
EDWIN L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY
and
RUSSELL'S ELECTRIC SERVICE
and JOHN DOE

COURT OF COMMON PLEAS, PHILA. COUNTY
NOVEMBER TERM,1996
NO. 2446

CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Pursuant to the Order of the Honorable Alfred J. DiBona, Jr. dated October 27, 1999, Appellants Emerson Electric ("Emerson") and Edwin L. Wiegand Company, Division of

Emerson Electric Company ("Wiegand") hereby submit the following Concise Statement of Matters Complained of on Appeal:

1. The trial court committed an error of law in failing to grant Emerson and Wiegand a new trial where the jury's verdict was against the weight of the evidence because, *inter alia,* the jury failed to accord due weight to the fact that the product was fit for its intended use as a component part in industrial applications, but was used and/or altered by Plaintiff in a manner inconsistent with its intended use.

2. The trial court erred, abused its discretion and acted contrary to law in denying Emerson and Wiegand's request to take the fact depositions of Plaintiff's expert witnesses Messrs. Gohean, Quinn, Farley and Marshall pursuant to Pa. R.C.P. 4003.5 (a) (3), *Inter alia*, due to the exceptional circumstances that these witnesses had inspected the fire scene before its destruction whereas Emerson had been denied the opportunity to inspect by Plaintiff's intentional acts.

3. The trial court erred, abused its discretion, and acted contrary to law in denying the Motion in Limine of Emerson and Wiegand to Preclude Evidence of Subsequent Product Design Changes.failure to warn which would give rise to liability under the Restatement (Second) of Torts § 402A.

...

40. The trial court erred, abused its discretion and acted contrary to law in denying Emerson and Wiegand's Motion

for Judgment Notwithstanding the Verdict rendered by the jury in this matter because the Court's failure to impose any sanction against Plaintiff based on its spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions.

41. The trial court erred, abused its discretion and acted contrary to law in denying Emerson and Wiegand's Motion for Judgment Notwithstanding the Verdict rendered by the jury in this matter because the Court's failure to afford Defendants any relief to discover the nature and extent of Plaintiff's spoliation of evidence deprived Defendants of their Due Process rights guaranteed by the United States and Pennsylvania Constitutions.

...

The orders being appealed by Emerson and Wiegand are appealable as matter if right, pursuant to Pa. R.A.P 341 (authorizing appeals as of right from final orders of administrative agencies or lower courts).

Respectfully submitted,

Lamb, Windle & McErlane, P.C.

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Supreme Court, U.S.
FILED
MAY 6 2003
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No. 02-1446

IN THE

Supreme Court of the United States

EMERSON ELECTRIC COMPANY,
and
EDWIN L. WIEGAND DIVISION,
EMERSON ELECTRIC COMPANY,
Petitioners,

v.

MOUNT OLIVET TABERNACLE CHURCH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The instant appeal arises from an action filed in the Court of Common Pleas for Philadelphia County, Pennsylvania for damages resulting from a November 26, 1994 fire in the Mount Olivet Tabernacle Baptist Church. At the trial of this case, the jury returned a unanimous verdict in favor of plaintiff and against defendants, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company[1] in the amount of $981,000.00 on May 20, 1999. The Court molded this verdict after the application of delay damages in the amount of $112,122.76 for a total amount of $1,093,122.76.

Emerson has filed unsuccessful appeals to the Pennsylvania Superior and Supreme Courts. Emerson's right of appeal in the courts of Pennsylvania was exhausted with the Pennsylvania Supreme Court's denial of Emerson's application for re-argument on December 27, 2002.[2]

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1. Emerson's Petition identifies the petitioner as "Edwin L. Wiegand Division, Emerson Electric Company." In fact, the judgment in this case was entered against both Emerson Electric Company and the Edwin L. Wiegand Division, Emerson Electric Company. Emerson's counsel, James Sargent, entered an appearance on behalf of both entities and represented both entities throughout the appeals in the state courts. Counsel has not advised plaintiff or the state courts of any change in that representation or of any change in the relationship between the two entities.

2. On January 17, 2003, after Emerson and its counsel ignored respondent's repeated demands for payment of the judgment, plaintiff filed a Petition for Enforcement of the liability of Federal Insurance Company on a supersedeas bond pursuant to Pa. R.A.P. 1734(c). Emerson filed a response to plaintiff's Petition, along with its own Petition for Stay of Execution pending appeal. By Order dated March 18, 2003 the Philadelphia Court of Common Pleas denied Emerson's Petition for Stay and granted Mount Olivet's Petition for Enforcement of the supersedeas bond. On March 28, 2003, Emerson filed a Notice of Appeal to the Pennsylvania Superior Court. On or about the same date Emerson filed an Emergency Motion for Reconsideration with the Philadelphia Court of Common Pleas and Motion for Stay of Execution with the Superior Court of Pennsylvania. On March 27, 2003, Emerson filed its Petition for a Writ of Certiorari to this Court.

This is a product liability case in which the jury found that the fire was caused by defects in the design and manufacture of an industrial immersion heater manufactured by Emerson.[3] At the time, Mt. Olivet presented the heater in question, thousands of photographs, videotapes, several experts, and voluminous documents to support its contention. The overwhelming evidence led the jury to a quick, unanimous verdict in favor of Mt. Olivet. Throughout the litigation and appeals in this case, Emerson has raised and abandoned various defenses.[4]

In essence, Emerson has unsuccessfully contended that its heater was not responsible for the fire, but that there was some other, unidentified, cause of the fire.[5] As a back-up defense, Emerson claimed that it was denied the opportunity to determine an alternative cause of the fire. Emerson claims that Mount Olivet "demolished the fire scene-and all other evidence of cause and origin..." and "unfairly prevented Emerson from investigating the scene and discovering alternative causes of the fire." (Emerson

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3. The immersion heater was placed in a baptismal font to heat the water for a baptism the next day. Mount Olivet presented evidence that the fire occurred when the water drained out of the font and the heater ignited because it lacked certain safety features, such as a high temperature cut off, and/or low liquid shutoff and warnings.

4. Significantly, Emerson did not challenge their immersion heater's design defect or otherwise avail themselves of potentially available product-related defenses. Rather, Emerson maintained that their various burning experiments established that their heater was not the cause of the fire. In its post-trial motion and appeal to the Pennsylvania Superior Court, Emerson asserted as grounds for review that Mount Olivet's use of the heater was not an "intended use" of the product, that Mount Olivet should have been sanctioned for the alleged "spoliation" of evidence and that the trial court improperly admitted evidence of other fires involving Emerson heaters. In its appeal to the Pennsylvania Supreme Court raised only the "spoliation" argument. In its Application for Reargument to the Pennsylvania Supreme Court, Emerson attempted for the first time to raise the "federal question" that is the basis of Emerson's Petition for Certiorari to this Court.

5. At trial, Emerson offered no suggestion as to what the alternative cause of the fire might be.

Petition, pp. 2-3). However, Emerson fails to mention that in addition to the heater itself, fire debris and other physical evidence, along with thousands of photographs, videotapes and documents were presented and made available to Emerson.[6] Indeed, Emerson retained several experts, performed exemplary tests, and constructed models of the church and floor in its defense.

In various motions to the trial court, Emerson requested that some sanction be imposed on Mount Olivet for the alleged "spoliation" of evidence. There was no destruction of evidence. The trial court declined to impose any sanction. The Pennsylvania Superior and Supreme Courts affirmed the trial court's ruling. In a transparent attempt to transform a purely evidentiary issue into a federal question, Emerson now contends that the Pennsylvania Supreme Court's decision violated its right to due process.

REASONS FOR DENYING THE WRIT

1. Emerson Electric Company And Edwin L. Wiegand Division, Emerson Electric Company Never Properly Raised a Federal Question In The Pennsylvania Courts

The Petition for Writ of Certiorari does not merit the Court's review for two reasons. First, Emerson Electric Company and Edwin L. Wiegand Division, Emerson Electric Company did not raise a federal question in the Pennsylvania courts. Second, Petitioners have not set forth any basis for which review by this Honorable Court is warranted.

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6. The trial court was in the best position to evaluate the quality and quantity of the actual evidence that plaintiff preserved. Emerson made its spoliation argument to the trial court on at least three occasions, at which time it had the opportunity to present all of the available evidence to the court and obtain a determination that the actual evidence preserved by Mount Olivet was inadequate. Each time, the trial court rejected Emerson's request for a sanction.

The United States Supreme Court's jurisdiction to review a decision of a state court is established by 28 U.S.C. § 1257, which states:

> **State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or *where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.* (emphasis added)

Similarly, Supreme Court Rule 14 requires that, where the appellant seeks review of a state court judgment, the petition for writ of certiorari must indicate, among other things, the stage in the proceedings (from the court of first instance through the appellate courts) where the federal question was raised, the manner of raising it and the way in which it was passed on by the courts, with pertinent quotations to specific portions of the record so as to show that the federal question was timely and properly raised.[7]

None of the state courts in this case addressed any federal question because Emerson never properly raised or

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7. Supreme Court Rule 15.2 requires that the brief in opposition to certiorari address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. The Rule further states: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition".

argued such a question. Emerson claims that a "fundamental fairness/due process rationale was a leitmotif of Emerson's briefs and argument.[8]" (Petition, p.4). Emerson then proceeds to cite instances in the record (only some of which are included in its Appendix) where it supposedly raised the due process issue. However, at most, Emerson refers to a few statements in various briefs and motions where it complains that it had been denied due process. Emerson has failed to demonstrate to this Court that it ever developed and presented an *argument* that would have provided the state courts with a fair opportunity to address the issue.[9]

In *Adams v. Robertson,* 520 U.S. 83; 117 S. Ct. 1028; 137 L. Ed. 2d 203 (1997), this Court dismissed a Writ of Certiorari as improvidently granted where the Petitioners raised their federal due process claim in their petition for rehearing before the Alabama Supreme Court. The Court stated that it has generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question. 520 U.S. at 89.

In reviewing state court judgments under 28 U.S.C. § 1257, the Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision. 520 U.S. at 86. When the highest state court is silent on a federal

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8. As an example of its "fundamental fairness/due process leitmotif", Emerson refers to its citation to *Northern Assurance Co. v. Ware,* 145 F.R.D. 281 (D. Maine 1993) in a Motion for Summary Judgment (which has not been included in the Appendix) and its statement that Mount Olivet's alleged spoliation of evidence "effectively eliminated Defendant's ability to present evidence to the jury as to the actual cause of the fire" (Emerson Petition, pp. 4-5). However, this Court has held that the casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Adams v. Robertson, supra,* 117 S.Ct. at 1030; *Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940, 1948, n.9 (1987).

9. Footnote 9 is missing.

question, the Supreme Court assumes that the issue was not properly presented. *Id., Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Id.* The Petitioner must demonstrate that it complied with the applicable state rules for raising a federal due process claim before the state Supreme Court, or explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim. *Id.* at 1030.

In *Webb v Webb,* 451 US 493, 68 L Ed 2d 392, 101 S Ct 1889 (U.S. 1981), this Court determined that a mother who sought custody of her minor child in proceedings in the state court had failed to properly raise or preserve, in the courts of that state, a federal constitutional claim that she raised in a certiorari petition filed in the Supreme Court. In dismissing the writ of certiorari, for want of jurisdiction, this Court noted that nowhere in the opinion of the highest state court was any federal question mentioned, let alone expressly passed upon. Moreover, a federal issue was not mentioned by the dissenting opinion in that court. The Court stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." 451 U.S. at 495; *see also, Street v. New York,* 394 U.S. 576, 582 (1969); *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 290, n. 3 (1973); *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945).

The *Webb* court stated:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the

> state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

451 U.S. at 501.

Neither the Pennsylvania Superior nor Supreme Court addressed any federal question in this case. Therefore, it is Emerson's burden to demonstrate that a federal question was properly presented to those courts. Emerson's Petition for a Writ of Certiorari fails to demonstrate that Emerson complied with the applicable state rules for raising its federal due process claim before the Pennsylvania appellate courts. For that reason alone, the Petition should be denied.

Emerson does not satisfy its burden by claiming that it "argued" in a post-trial motion that the trial court's denial of its request for a sanction "deprived defendants of their due process rights guaranteed by the United States and Pennsylvania Constitutions" (Emerson Petition, pp. 5). The issue is not whether Emerson asserted a federal claim in a trial court pleading, but whether such a claim was either addressed by, or properly presented to, the appellate court that rendered the decision that Emerson has asked this Court to review. *Adams v. Robertson,* 520 U.S. at 86.[10]

The spoliation argument in Emerson's Pennsylvania Superior Court Brief does not mention its supposed federal or state constitutional due process rights, and certainly does

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10. For the same reason, a federal question was not raised by Mount Olivet's Answer to Emerson's post-trial motion. Furthermore, an issue mentioned by the respondent in the state court does not demonstrate that the Petitioner properly presented the issue to the state appellate court. *Adams v. Robertson,* 520 U.S. at 89.

not assert any theory that could be characterized as a federal question. Moreover, that Brief did not cite any authority that would support a federal due process claim.[11]

Emerson's "due process" claim was barely alluded to, and certainly not developed, in Emerson's principal and reply briefs filed in the Pennsylvania Supreme Court. *Adams v. Robertson, supra,* 520 U.S. at 89, n.3 (passing invocations of "due process", with no citation to the Federal Constitution or any cases relying on the Fourteenth Amendment, are insufficient to raise federal question). Therefore, it was waived.

Emerson claims that it invoked its due process in the Supreme Court of Pennsylvania by noting in the "Statement of the Issues Presented" portion of its brief that the lack of a remedy for spoliation "violates the Defendant's rights to due process and a fair trial." (Emerson Petition, p. 7). However, under Pennsylvania law, an issue raised in the Statement of Questions, but not argued in the brief is deemed to be waived. *Ruzzi v. Butler Petroleum Company,* 527 Pa. 1, 588 A.2d 1, 11, n.1 (1991) (concurring opinion).

Emerson further claims that, in its brief to the Pennsylvania Supreme Court, it "pointedly invoked both federal and state due process before the Pennsylvania Supreme Court, in arguing that 'Emerson was denied

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11. Emerson asserts that "throughout the proceedings in the Pennsylvania intermediate appellate court, Emerson pressed its arguments rooted in due process and fundamental fairness"(Emerson Petition, p. 6). In support of that assertion Emerson claims that it argued in its Pennsylvania Superior Court brief that it was "substantially prejudiced", that it was deprived "of the ability to defend and mount an effective defense" and that the destruction of fire scene evidence deprived Emerson "of a fair opportunity to defend itself." (Id.) However, such boilerplate phrases, which could apply to any claim that the state court erred in ruling on an evidentiary issue, are not sufficient to invoke the different and broader question whether the Federal Constitution requires the imposition of a sanction. Despite Emerson's belief that such statements are "rooted in due process," they certainly do not meet the requirements of Rule 14. *see, Adams v. Robertson,* 520 U.S. at 88-89.

fundamental rights guaranteed to all litigants in this country and throughout this Commonwealth; the rights to due process and a fair trial after a balanced investigation of all relevant facts' " (Emerson Petition, p. 7). Emerson claims that its reference to " 'all litigants in this country' was, of course, an invocation of federal due process..." (Emerson Petition, p. 7). However, such a passing reference to "due process" with no citation to the Federal Constitution or any cases relying on the Fourteenth Amendment, does not meet this Court's minimal requirement that it must be clear that a federal claim was presented. *Adams v. Robertson, supra,* 520 U.S. at 89, n.3. Furthermore, the bald assertion of an undeveloped claim is not sufficient to preserve an issue for review by the Pennsylvania Supreme Court. *Madison Construction Company v. Harleysville Mutual Insurance Company,* 557 Pa. 595, 735 A.2d 100, 109, n.8 (1999) (court will not review undeveloped contention in footnote to brief where the issue was not included in appellant's Summary of Argument or in its Petition for Allowance of Appeal). Therefore, Emerson's casual reference to "due process" in its brief was insufficient to preserve a federal issue for review by either this Court or the Supreme Court of Pennsylvania.

Further, no federal question was raised in Emerson's Petition for Allowance of Appeal to the Pennsylvania Supreme Court or included in the "Statement of Issues Requiring Allowance of Appeal," within that filing. Therefore, even if Emerson's brief had contained more than a vague reference to a "due process" claim, that claim was clearly waived by reason of its lack of inclusion in Emerson's Petition for Allowance of Appeal and that document's statement of issues. *Lewis v. United Hospitals, Inc.,* 547 Pa. 626, 692 A.2d 1055, 1068, n.5 (1997); *City of Philadelphia v. Gray,* 534 Pa. 467, 633 A.2d 1090, 1091, n.1 (1993); *Thompson v. Mason Hospital,* 527 Pa. 330, 691 A.2d 703, n. 3 (1991); *Abramson v. Commonwealth Public Utility Commission,* 489 Pa. 267, 415 A.2d 50, 62 n.5 (1980)

("[d]ue [p]rocess argument waived where not properly presented in Petition for Allowance of Appeal").

In fact, Emerson first attempted to raise a federal "due process" argument in its Application for Reargument before the Pennsylvania Supreme Court.[12] However, at that point, it was too late to raise the issue. As in *Adams v. Robertson,* Emerson's Application for Reargument was insufficient to preserve the issue for review by this Court, when it was not previously presented to or addressed by the state appellate courts. 520 U.S. at 89.

The simple fact is that the focus of Emerson's spoliation argument in the Pennsylvania appellate courts was that the trial court supposedly improperly applied Pennsylvania spoliation law, as set forth by the Supreme Court in *Schroeder v. Pennsylvania Department of Transportation,* 551 Pa. 243, 710 A.2d 23 (1998). The Superior Court's opinion makes no mention of any federal issue. In affirming the Superior Court's order and denying Emerson's Application for Reargument, the Supreme Court issued only per curiam orders, with no opinion. Therefore, neither of the Pennsylvania appellate courts passed on or was properly presented with any federal issue. Accordingly, the sole claim upon which Emerson could have based a Petition for Writ of Certiorari has been waived for a variety of alternative reasons. *See generally, Harman v. Borah,* 562 Pa. 455, 765 A.2d 1116 (2000); *McMillen v. 84 Lumber, Inc.,* 538 Pa. 567, 572, 649 A.2d 932, 934 (1994); *Whistler Sportswear, Inc. v. Rullo, 289 Pa. Super.* 230, 240, 433 A.2d 40, 45 (1981).

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12. Emerson claims that, in its Application for Reargument, it "sought to ensure that the Pennsylvania courts had the fullest opportunity to explore the due process issue" (Emerson Petition, p. 8). However, in an argument of barely four pages, Emerson addressed the "due process" issue in the most superficial manner, not citing any factually similar cases. Instead, Emerson relied on decisions in criminal cases without explaining how the issues in those cases should apply to a civil products liability action (Emerson Petition, Appendix B, pp. 6a-10a).

Emerson fails to demonstrate that it preserved a federal question for review. Based on the issues that Emerson actually raised in the Pennsylvania appellate courts, its Petition for Writ of Certiorari is, on its face, fatally defective. Therefore, even if there were any substantive basis for granting certiorari, Emerson's Petition must be denied because it cannot demonstrate that a federal issue was raised in the Pennsylvania courts.

2. Spoliation Of Evidence Is An Evidentiary Issue Which Has Been Properly Decided By The Trial Court And Appellate Courts Of Pennsylvania

Emerson claims that the Pennsylvania Supreme Court's decision violated its right to due process because it affirmed the trial court's refusal to impose a sanction on Mount Olivet for the alleged spoliation of evidence. Emerson argues that the Pennsylvania court is guilty of "permitting such flagrant and unjustified spoliation" and, thus, has "given its blessing to this widespread technique for subversion of the adversary process and has permitted substantial deprivation of Emerson's opportunity to be heard in a "meaningful manner" (Emerson Petition, p. 9). Thus, the putative denial of due process was Emerson's inability to make use of "evidence" that it believed might have been useful in conducting a defense to Mount Olivet's claim. However, Emerson has never identified or even suggested what that "evidence" might be. Likewise, Emerson has not provided even an arguable explanation as to how that "evidence" would support its defense.[13]

The only issue properly presented to the Pennsylvania Supreme Court was whether the trial court committed an abuse of discretion in refusing to grant the various sanctions demanded by Emerson for the alleged "spoliation of

13. Rather, Emerson claims that if the church had not been in the process of reconstruction, it might have found evidence of some cause of the fire other than its defective heater.

evidence" by Mount Olivet. Both the trial court and the Pennsylvania Superior Court analyzed Emerson's spoliation argument in the context of the Pennsylvania Supreme Court's decision in *Schroeder v. Commonwealth of Pennsylvania, Department of Transportation, et al.*, 551 Pa. 243, 710 A.2d 23 (1998).[14] The Pennsylvania Superior Court held that application of the *Schroeder* test did not require the imposition of a sanction. The Pennsylvania Supreme Court affirmed in a per curiam order, with no written opinion.

Emerson now attempts to turn a Pennsylvania evidentiary issue into a case of constitutional proportions by gross exaggerations and distortions of fact.[15] However, aside from a few very broad statements of general legal doctrine, Emerson cites no authority for finding a denial of due process in the circumstance of this case.[16]

Furthermore, Emerson's Petition is void of any detail as to how the Pennsylvania Supreme Court's ruling violated its

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14. The *Schroeder* court adopted the Third Circuit's three-part standard for determining if a sanction is required. 710 A.2d at 27; *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). In deciding the proper penalty for the spoliation of evidence, the Third Circuit found relevant (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. 13 F.3d at 81.

15. For example, Emerson states with no evidentiary support that for nineteen months after the fire "the Church culled the scene in search of evidence to support its theory against Emerson" and that "the Church and its insurer, who controlled the fire scene for months after the fire were allowed to preserve only evidence which supported their theory of the case and destroy all other evidence long before notifying the target defendant, Emerson" (emphasis in original) (Emerson Petition, pp. 2, 9)

16. Emerson cites to criminal cases, paternity proceedings, social security benefits determinations and suspensions of drivers' licenses, but fails to explain how the issues peculiar to those actions have any bearing on the issues in this case(Emerson Petition, pp. 11-14).

due process rights.[17] Emerson contends that Mount Olivet and its counsel "deprived Emerson of the opportunity to defend itself against plaintiff's claims when the fire scene was destroyed..." and that "this situation demanded that some relief-either in the form of dismissal, preclusion of expert evidence, or some other type of sanction-be afforded to Emerson in order to neutralize the clear prejudice that had been caused by plaintiff's actions." (emphasis in original) (Emerson Petition, pp.13, 14). Obviously, even if those accusations were true, they concern the conduct of Mount Olivet, not any acts or omissions of the Pennsylvania courts.

In this regard, it is important to emphasize that "due process" is concerned with the *procedure* that the state follows in determining the rights and duties of the complaining party. Emerson does not claim that it was denied the opportunity to present its spoliation argument.[18] Nor does Emerson claim that there is any flaw in the procedure that the Pennsylvania courts follow to determine if a sanction is required.[19]

Rather, the alleged due process violation was apparently nothing more than the Pennsylvania courts' refusal to grant the relief that Emerson demanded. As such, Emerson's position is no different from any party who believes that it was placed at a disadvantage by a court's

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17. Emerson states that "the question is whether, having made the state courts available to a plaintiff like Mt. Olivet, the state can then use its evidentiary rulings to deny the defendant, Emerson, a meaningful hearing."

18. In fact, Emerson argued the "spoliation" issue at least three times before the trial court, submitted appellant's briefs and applications for reargument to the Pennsylvania Superior and Supreme Courts and presented oral arguments to both appellate courts.

19. Emerson does not argue that application of the *Schroeder* analysis itself violates due process rights.

ruling on an evidentiary issue. However, the right of due process does not guarantee a particular result.

Emerson took advantage of every opportunity to raise the "spoliation" issue and the courts properly and consistently rejected Emerson's arguments each time. However, even if all of the courts that considered the issue had erred in their rulings, Emerson has presented no legal authority for transforming that error into a constitutional violation.

Emerson cites only one decision by this Court that even remotely concerns an evidentiary issue. Emerson claims that there is a "striking parallel" between this case and *Little v. Streater,* 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), a paternity action in which the indigent defendant was denied access to blood tests of the child. However, the only "parallel" between the two cases is that the defendants in each case claimed that their due process rights were violated when the lower courts ruled against them on an evidentiary issue. In all other significant respects, the cases are completely distinguishable. As this Honorable Court observed, the defendant's due process claim in *Little* was "premised on the unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law." *Id.* at 6. Obviously, no similar concerns are present in this case.

In *Little,* the applicable statute required that the cost of blood tests in paternity actions be borne by the party requesting them. The court below ordered that the blood tests be taken, but refused the defendant's request that the state pay for the tests. This Court held that the statute violated the defendant's due process rights.

However, this Court's ruling was not based solely on the state's denial of access to evidence.[20] A critical factor in this Honorable Court's analysis was the fact that "state action" had "undeniably pervaded" the case because the state compelled the mother to identify the father and initiate an action to determine paternity, paid her litigation costs and would ultimately be the recipient of the monthly support payments made pursuant to the trial court's judgment. 452 U.S. at 9. This Court further observed that the nature of the paternity proceedings bore heavily on the due process claim because, although nominally "civil", they had "quasicriminal" overtones. *Id.* at 10.

Furthermore, this Court noted that, under Connecticut law, the defendant in a paternity action was placed at a distinct disadvantage in that his testimony alone was insufficient to overcome the mother's imputation of him as the father. *Id.* This Court reasoned:

> In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him... Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.

Id. at 12.

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20. Unlike the instant action, the evidence at issue in *Little* was unquestionably relevant. As this Court observed, the ability of blood grouping tests to exonerate innocent putative fathers was confirmed by a 1976 report developed jointly by the American Bar Association and the American Medical Association. *Id.* at 7. In contrast, Emerson claims that it was denied access to unidentified "evidence" to support an entirely speculative theory as to an alternative cause of the fire.

In finding that application of the statute violated the defendant's due process rights, this Court concluded:

> Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard."

Id. at 16.

Emerson relies almost entirely on the *Little* decision,[21] but completely ignores this Court's analysis of the elements that must be evaluated in determining what process is constitutionally due. Those elements are: the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected.[22] *Id.* at 13.

None of the concerns addressed in *Little* is even remotely implicated in this case.[23] First, the private

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21. Emerson cites other decisions of this Court only as support for broad statements of legal doctrine, without explaining how the circumstances of any of those cases are analogous to the circumstances of this case (Emerson Petition, pp. 10-14).

22. In *Little*, this Court found substantial private interests implicated in the creation of a parent-child relationship, as well as in the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance. *Id.* This Court also found that the availability of scientific blood test evidence clearly would be a valuable procedural safeguard to avoid the "not inconsiderable" risk that a defendant would be erroneously adjudged the father in its absence. *Id.* at 14. Finally, this Court found that the State's monetary interest in avoiding the expense of blood grouping tests was not significant enough to overcome the important private interests at issue. *Id.*

23. Emerson makes no attempt to explain how the above elements are satisfied, but merely asserts that "Pennsylvania has essentially denied Emerson 'the most probative additional evidence' needed to support its case." (Emerson Petition, p. 11).

interests at stake in this action are no greater than the interests of every defendant in every civil action. Emerson has admitted that it is a substantial, financially robust company[24] with resources more than sufficient to conduct a substantial and meaningful defense in this case. Indeed, Emerson retained several experts, conducted significant exemplary testing, built models of the church and floor and presented photographs, videotapes and documents. Moreover, Emerson has not identified any private interest in this product liability action that warrants constitutional protection.

Furthermore, there is little, if any, risk that the procedure followed by the Pennsylvania courts will lead to an "erroneous result" in the circumstances of this case.[25] In this regard, it is important to emphasize that this a classic product liability design defect case which was litigated consistently with the Rules of Evidence, Civil Procedure and relevant evidence. Emerson was protected from the possibility of an "erroneous result" at various stages of the trial and throughout the appellate process, as the evidentiary issues were reviewed and ruled upon consistent with the rules of evidence and case law. Regardless of whether any sanction was imposed, Mount Olivet still had the burden to prove that a defect in the design of Emerson's heater was responsible for the fire. The heater itself, along with substantial other physical evidence, thousands of photographs, videotapes and documents were presented and admitted into evidence.

Emerson chose not to defend the design of its product. Rather, Emerson claimed that its product did not cause the fire and then took advantage of every opportunity to raise a number of defenses including a creative "spoliation" issue

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24. According to Emerson's 2002 Annual Report, it had sales of $13.8 billion last year, with net earnings of $1.06 billion.

25. Again, Emerson does not challenge the *Schoeder* analysis or any other aspect of the Pennsylvania court's procedure in evaluating the "spoliation" issue. Emerson criticizes only the result.

before, during and after the trial and through the appellate process. Even if the Pennsylvania courts had erred in denying the relief demanded, there was no flaw in the procedure that created an impermissible risk of an erroneous result. Indeed, throughout discovery proceedings, Motions in Limine, Motions for Summary Judgment, trial, post-trial motions and the appeal, the process was examined and determined to be appropriate.

Finally, Emerson has not suggested a "procedural safeguard" of any value. In fact, it is difficult to determine what remedy Emerson is asking this Court to provide.[26] Emerson appears to demand that this Honorable Court promulgate a universal requirement that whenever a defendant claims spoliation of evidence, regardless of the merit of such claim, that a sanction be imposed. However, due process does not require such a fundamentally unfair remedy.

Such a "procedure" would permit a "spoliation" sanction to be used offensively to defeat an otherwise valid claim, as Emerson has attempted to do here. Following Emerson's argument, spoliation could be used as a defense whenever a defendant claims that it has been denied the opportunity to search for evidence that may or may not exist, and which may or may not be helpful to it. However, under Pennsylvania law, spoliation is a rule of evidence that permits the imposition of a sanction only in certain instances where the destruction of relevant evidence genuinely causes prejudice to a party. It is not intended as a back up defense to be used when the defense on the merits fails. Emerson urges this Court to impose a sanction for the supposed destruction of evidence of an alternative cause of the fire, but has never requested an evidentiary hearing nor offered testimony supporting such relief nor even provided a

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26. Emerson states that "remedies for spoliation will continue to evolve through legal and policy judgments made by state and federal courts, as well as by legislators."(Emerson Petition, p. 19).

credible theory as to a source of ignition other than the heater.

The *Schroeder* analysis provides the procedural safeguard that due process requires. It protects the rights of both plaintiffs and defendants through a case-by-case analysis of the degrees of fault and prejudice, if any, of each party. The Pennsylvania courts followed that analysis in determining that no sanction was required in this case.

Therefore, there has been no violation of any constitutional right and no grounds for this Court to grant Certiorari in this case. Accordingly, Mount Olivet Tabernacle Church respectfully requests that this Court deny Emerson's Petition for Writ of Certiorari.

3. Pursuant To Supreme Court Rule 42, Mount Olivet Is Entitled To Recover Damages And Costs From Emerson And Its Counsel

Supreme Court Rule 42 provides that, where a Petition for Writ of Certiorari is frivolous, the respondent may recover an award of "just damages and single or double costs" against the petitioner, its counsel or both. Mount Olivet respectfully submits that Emerson's Petition for Writ of Certiorari is frivolous both because it is based on an issue that was never raised in the state courts and because there is not even an arguable substantive basis for the claim.

Emerson claims that its "fundamental fairness/due process rationale was a leitmotif of" its briefs and arguments "at every stage of the Pennsylvania proceedings-in the trial, appellate and supreme courts..." (Emerson Petition, p. 4). However, Emerson cannot point to a single place in any of its many briefs to the Pennsylvania appellate courts where it presented a developed *argument* to the court with citations to appropriate legal authority. Emerson and its counsel are well aware that no such argument was ever made to either the Superior or Supreme Court, prior to their belated and first attempt to raise the

issue in their Application for Reargument to the Supreme Court.

Emerson's bad faith is further demonstrated by its superficial analysis of the "due process" claim in its Petition to this Court. Emerson completely ignores the elements that this Court has long evaluated in determining what process is constitutionally due. Instead, Emerson bases its argument on gross generalizations and broad statements of legal doctrine, and makes no effort to provide this Court with case law involving factual situations that are even remotely similar to this case. Emerson does not even favor this Court with a proposed remedy for the alleged violation of its rights.

Accordingly, Mount Olivet respectfully requests that this Court award damages against Emerson and its counsel for the attorney fees and costs incurred in preparing its Brief in Opposition. A Bill of Costs will be submitted to this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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